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Supreme Court of the United States

NIMATALLAH SHAFIK MASSIS,
Petitioner,

v.

ERIC HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fourth Circuit erred in concluding that it lacked jurisdiction to entertain a purely legal challenge to an alien's removal order on the ground that the alien had not raised that issue before the agency, even though the government neither argued in its brief that the alien had failed to exhaust the issue nor disputed the legal error underlying the alien's removal order, and the alien raised the issue in a motion to reopen.

2. Whether an alien in a removal proceeding is denied his Fifth Amendment right to due process when ineffective assistance of retained counsel caused him to concede before an immigration judge that he was removable as an aggravated felon, even though he had not committed an aggravated felony and there was no tactical advantage to counsel's concession.

PARTIES TO THE PROCEEDING

Petitioner Nimatallah Shafik Massis was the petitioner in the court of appeals. Respondents are the Attorney General of the United States, the Secretary of Homeland Security, the Assistant Secretary of Homeland Security, and the Homeland Security Field Office Director, who were the respondents in the court of appeals.

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IN THE

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NIMATALLAH SHAFIK MASSIS,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Nimatallah Shafik Massis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App. 1a-20a) is reported at 549 F.3d 631.

The initial decision of the Immigration Judge (IJ) accepting petitioner's concession of deportability (App. 51a-53a) is unreported, as is a subsequent decision of

the IJ granting petitioner a discretionary waiver from removal (App. 31a-50a).

The decision of the Board of Immigration Appeals (BIA) vacating the IJ's grant of a discretionary waiver from removal (App. 25a-30a) is unreported, as is the decision of the BIA denying petitioner's motion to reopen (App. 21a-23a).

JURISDICTION

The court of appeals entered its judgment on December 9, 2008. App. 1a-20a. On February 23, 2009, this Court extended the time for filing a petition for certiorari to and including May 8, 2009. No. 08A731. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall ... be deprived of life, liberty, or property, without due process of law[.]"

2. 8 U.S.C. § 1252 provides in relevant part:

> (d) Review of final orders
>
> A court may review a final order of removal only if—
>
> (1) the alien has exhausted all administrative remedies available to the alien as of right, and
>
> (2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the

prior proceeding was inadequate or ineffective to test the validity of the order.

STATEMENT

1. Petitioner Nimatallah Shafik Massis entered the United States on November 20, 1974, as a lawful permanent resident. He has four children, all of whom are United States citizens, and lives in his own home in Rockville, Maryland.

In 1995, Massis was arrested for threatening his ex-wife with an ax. He pleaded guilty to and was convicted of misdemeanor reckless endangerment under Maryland law, and was sentenced to prison. App. 4a. Mental health professionals later determined that Massis suffered from an untreated psychiatric condition that they identified as a bipolar disorder with psychotic features. AR 639; CAJA 75-76.[1] While in prison, Massis sought treatment for his psychiatric condition; since his release in 2000, he has been under the continuous treatment of mental health professionals. AR 574, 639; CAJA 71-78, 81-82, 94. Massis and his ex-wife subsequently reconciled and now enjoy a friendly relationship. CAJA 196-197, 202-203, 219-222; *see also* App. 47a.

The government initiated removal proceedings against Massis in 1996 based on his reckless endangerment conviction, charging that Massis was deportable as an aggravated felon under 8 U.S.C. § 1227(a)(2)(A)(iii). App. 4a-5a. It alleged that Massis's

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[1] Citations to the Administrative Record are abbreviated "AR." Citations to the Court of Appeals Joint Appendix are abbreviated "CAJA."

reckless endangerment conviction qualified as a "crime of violence" under 18 U.S.C. § 16 and therefore amounted to an "aggravated felony" as defined in 8 U.S.C. § 1101(a)(43)(F). App. 5a n.3.

In fact, Massis is not removable. It is uncontested that his crime of conviction is not a "crime of violence" as a matter of law and therefore is not an "aggravated felony." The Maryland misdemeanor reckless endangerment statute governing Massis's conviction states that "[a]ny person who recklessly engages in conduct that creates a substantial risk of death or serious physical injury to another person" is guilty of misdemeanor reckless endangerment. Md. Ann. Code art. 27, § 120(a) (1995).[2] That statute does not include the use of force as an element, and by the time of Massis's conviction, the statute had been definitively construed by the Maryland courts not to require or inherently involve the use of force. *See Minor* v. *State*, 605 A.2d 138, 141 (Md. 1992). Reckless endangerment in Maryland is therefore not a "crime of violence" under the two-part test of 18 U.S.C. § 16 because it neither includes force as an element (Section 16(a)) nor "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense" (Section 16(b)). It is therefore not an "aggravated felony" under the Immi-

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[2] The statute has since been twice modified and renumbered. The current version of the statute is Maryland Annotated Code, Criminal Law § 3-204. The statute has remained substantially the same except for the addition of a sub-offense for the reckless discharge of a firearm from a motor vehicle. *See id.* § 3-204(a)(2).

gration and Nationality Act (INA). *See Leocal* v. *Ashcroft*, 543 U.S. 1, 11 (2004).[3]

Nevertheless, in an initial hearing before an IJ in 1998, Massis's first attorney conceded that Massis was removable as an aggravated felon and sought a waiver from removal under former INA § 212(c) (then codified at 8 U.S.C. § 1182(c) (repealed 1996)). App. 5a. Following this erroneous concession by Massis's first lawyer, the administrative proceedings against Massis were premised on the notion that he is removable as an aggravated felon.

In 2003, after an extensive hearing, the IJ granted Massis discretionary relief from removal pursuant to former Section 212(c). App. 31a-50a. The IJ explained that, although Massis's misconduct was "serious," his mental illness would make removing him "unconscionable." App. 48a. Among the evidence "[t]ipping the balance" in Massis's favor was evidence that he was no longer dangerous and that his ex-wife no longer feared him. *Id.*

The government appealed the grant of Section 212(c) relief to the BIA. On appeal, Massis was represented by a new, second attorney who did not recognize his first attorney's error in conceding removability. In February 2005, the BIA vacated the IJ's decision. App. 25a-30a. The BIA acknowledged Massis's "serious mental disorder," but determined that the disorder "does not excuse his behavior." App. 29a. The BIA or-

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[3] Massis's reckless endangerment conviction also cannot qualify as an aggravated felony because it is a misdemeanor under state law. *See infra* p. 33 (cases holding that state law classification controls).

dered Massis removed to Jordan, a country to which Massis has no connection and in which he has no family.[4]

Following the BIA's decision, Massis retained his present, third counsel, who recognized the critical error in his first attorney's representation: Massis is not removable as an aggravated felon. In a timely motion to reopen the BIA's decision, Massis argued that the erroneous concession amounted to ineffective assistance of counsel. App. 7a. Massis also presented the merits of his argument that misdemeanor reckless endangerment is not an aggravated felony, both in support of his ineffective assistance contention, CAJA 321-327, and as an independent reason to reopen the removal order, *id.* 331-333. The BIA nonetheless rejected the ineffective assistance claim and denied the motion to reopen, but in so doing, failed to address Massis's argument that the Board should reopen *sua sponte* to prevent the miscarriage of justice that would result if Massis were removed as an aggravated felon without any proper legal basis. App. 21a-23a.

2. Massis petitioned the Fourth Circuit for review of the BIA's removal order and denial of his motion to reopen.[5] He argued that misdemeanor reckless endangerment in Maryland is not a "crime of violence" under

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[4] Massis was ordered removed to Jordan because he was born in 1950 in a part of Jerusalem then under Jordanian control. *See* App. 26a n.1.

[5] Massis, through his third counsel, also filed a petition for habeas corpus to enjoin his removal. That petition was transferred to the Fourth Circuit pursuant to the Real ID Act of 2005 and consolidated with Massis's petitions for review of the BIA's removal order and its denial of his motion to reopen. *See* App. 7a & n.5.

18 U.S.C. § 16 and therefore not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F). *See* Pet. C.A. Br. 15-29. He also contended that the BIA erred in refusing to reopen the proceedings because his first counsel's ineffective assistance amounted to a due process violation. *Id.* 31-36. Massis further argued that, in light of the fundamental miscarriage of justice that would result should he be removed as an aggravated felon based solely on his first counsel's erroneous concession, the court of appeals should decide the purely legal question of his deportability. *Id.* 37-40.

In response, the government argued that the BIA had correctly rejected Massis's ineffective assistance of counsel claim, raised in the motion to reopen. But the government did not dispute Massis's fundamental contention that he is not removable as an aggravated felon, stating only in a footnote that "it would not 'result in the denial of fundamental justice' to hold an alien to a concession of deportability." Gov't C.A. Br. 12 n.3 (citation omitted). Nor did the government argue in its brief that Massis had waived his legal challenge to his removal order by failing to present it at the administrative level on direct review. As Massis noted in his reply brief, the government thereby waived any waiver argument it may have had regarding Massis's failure to exhaust the issue of removability. *See* Pet. C.A. Reply Br. 7 & n.5.

3. The court of appeals denied in part and dismissed in part Massis's petitions for review. As to the ineffective assistance of counsel claim, the court concluded that the BIA had not abused its discretion in rejecting the claim, and the court also noted that its recent decision in *Afanuri* v. *Mukasey*, 526 F.3d 788 (4th Cir. 2008), *petition for cert. filed* (U.S. Jan. 16, 2009) (No. 08-906), foreclosed Massis's constitutional due

process claim based on ineffective assistance of counsel. App. 13a-14a.

The court also dismissed, for lack of jurisdiction, Massis's legal argument that he is not removable because his crime was not an aggravated felony. App. 20a. The court concluded that, because Massis had not presented that argument on direct appeal to the BIA, he had failed to exhaust his administrative remedies as to that issue. App. 15a ("[A]n alien's failure to dispute an issue on appeal to the BIA constitutes a failure to exhaust administrative remedies that bars judicial review."). The court construed Section 1252(d)(1)—which requires exhaustion of administrative remedies before an alien challenges a removal order in the court of appeals—as imposing a jurisdictional bar against judicial review of any issue that was not raised in the administrative proceedings. *Id.* In particular, the court understood *Bowles* v. *Russell*, 127 S. Ct. 2360 (2007), to preclude it from creating an equitable "miscarriage of justice" exception to Section 1252(d)(1)'s purported issue exhaustion requirement. App. 19a-20a. Accordingly, the court of appeals did not address the fact that the government's brief neither contended that Massis had waived his legal challenge to the removal order nor argued that he was, in fact, removable.

REASONS FOR GRANTING THE PETITION

There is no question that Congress has required an alien challenging his removal order to exhaust available administrative remedies before petitioning the courts of appeals for review. 8 U.S.C. § 1252(d)(1). The principal question in this case is whether that requirement also imposes a *jurisdictional* bar against judicial review of issues that were not properly raised before the agency, such that the court of appeals lacks *power* to review

any issue not presented to the agency—even if the government does not argue waiver and does not contest the challenge on the merits, and even if a miscarriage of justice would result from the court's failure to review the issue. In so ruling here, the court of appeals placed itself in conflict with other circuits that have instead addressed similar situations under ordinary principles of exhaustion, which permit waiver or exceptions in extraordinary circumstances such as those here, where petitioner is not even removable and the government has neither argued otherwise on appeal nor even argued that petitioner waived his legal challenge by failing to present it to the agency. The court of appeals' interpretation of Section 1252(d)(1) as a jurisdictional bar against review of unexhausted arguments is contrary to this Court's decisions and deepens a widespread circuit conflict on that issue.

This Court has required that Congress clearly state its intent to establish a jurisdictional bar, *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 515-516 (2006), and has repeatedly cautioned against construing prerequisites to judicial review as "jurisdictional," *see id.* at 510; *Eberhart* v. *United States*, 546 U.S. 12, 16 (2005) (per curiam); *Kontrick* v. *Ryan*, 540 U.S. 443, 455 (2004). Here, the court of appeals had jurisdiction over petitioner's petition for review under 8 U.S.C. § 1252(a)(1) and (a)(2)(D). Whether it could reach particular issues raised in that petition for review is not a question of jurisdiction but of administrative exhaustion, which is presumed *not* to be a jurisdictional requirement, *Sims* v. *Apfel*, 530 U.S. 103, 107-108 (2000), and which may be waived in certain, well-settled circumstances, *e.g.*, *Hormel* v. *Helvering*, 312 U.S. 552, 556-557 (1941). By interpreting Section 1252(d)(1) to require administrative exhaustion of all issues as a jurisdictional matter,

the Fourth Circuit improperly precluded judicial review of even a purely legal challenge to a removal order when the government waived its argument that the alien failed to exhaust the issue and never argued that the alien was in fact removable, and when removal would result in manifest injustice.

The Fourth Circuit's decision also conflicts with the decisions of other courts of appeals that have considered whether administrative exhaustion of specific issues is a jurisdictional requirement under Section 1252(d)(1). Eleven circuits have addressed the question and have adopted a bewildering variety of approaches, revealing significant confusion about when (if ever) an exhaustion requirement should be considered "jurisdictional." The Fourth Circuit's decision is indicative of this disarray. The persistence of these conflicting approaches makes clear that disagreement over this important issue will continue absent this Court's intervention.

In addition, the Fourth Circuit's conclusory rejection of Massis's constitutional ineffective assistance of counsel claim implicates an important constitutional question that has sharply divided the courts of appeals. The court below relied on *Afanwi* v. *Mukasey*, 526 F.3d 788 (4th Cir. 2008), in which the Fourth Circuit held that there is no right under the Due Process Clause of the Fifth Amendment to effective assistance of retained counsel in removal proceedings. In a pending petition for certiorari, Joseph Afanwi has asked this Court to resolve this sharp conflict among the circuits. *See* Pet., *Afanwi* v. *Holder* (U.S. Jan. 16, 2009) (No. 08-906). Because the Court's disposition of Afanwi's petition may affect the outcome of this matter, the Court should at a minimum hold this case until it has decided whether to grant review in *Afanwi* and then dispose of

this case consistent with its disposition of *Afanwi*, even if the Court does not grant review of the principal question presented in this case.

I. THE FOURTH CIRCUIT'S DECISION EXACERBATES A CONFLICT AMONG ELEVEN CIRCUITS REGARDING WHETHER ISSUE EXHAUSTION IS A JURISDICTIONAL REQUIREMENT UNDER 8 U.S.C. § 1252(d)(1)

There is a widespread split, as well as significant confusion, among eleven circuits regarding whether the requirement in 8 U.S.C. § 1252(d)(1) that aliens exhaust available administrative remedies creates a jurisdictional bar to judicial review of unexhausted issues. Decisions from two circuits (the Second and Seventh) hold that Section 1252(d)(1) does not deprive courts of appeals of subject matter jurisdiction over issues in a petition for review that an alien failed to raise before the BIA and IJ. Nine circuits (the First, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh) have held that they lack jurisdiction to review such unexhausted issues. Yet five of those nine (the First, Sixth, Eighth, Ninth, and Tenth) permit or have discussed prudential exceptions to their "jurisdictional" rule, indicating that the rule is not truly jurisdictional. Moreover, three of the nine "jurisdictional" circuits (the First, Third, and Eighth) have indicated that they are constrained by binding circuit precedent to remain in the "jurisdictional" camp, strongly implying that they believe that their prior decisions erroneously construed Section 1252(d)(1) as a jurisdictional provision barring review of unexhausted issues.

A. The Fourth Circuit's Decision Squarely Conflicts With Decisions Of The Second And Seventh Circuits

The Fourth Circuit's decision squarely conflicts with decisions of the Second and Seventh Circuits, which have declined to treat Section 1252(d)(1) as a jurisdictional bar to review of unexhausted issues. These courts' decisions anchor their holdings in: (1) this Court's "recent admonition that inferior courts must use great caution in distinguishing mandatory from jurisdictional rules," *Lin Zhong* v. *DOJ*, 480 F.3d 104, 119 (2d Cir. 2007) (citing *Eberhart*, 546 U.S. at 16); *Korsunskiy* v. *Gonzales*, 461 F.3d 847, 849 (7th Cir. 2006) (Easterbrook, C.J., joined by Posner and Coffey, JJ.) (same); (2) the lack of an express statutory proscription against judicial review of unraised issues, *Lin Zhong*, 480 F.3d at 120-121; *cf. Abdelqadar* v. *Gonzales*, 413 F.3d 668, 671 (7th Cir. 2005); and (3) this Court's case law declining to read issue exhaustion requirements into statutes, *Lin Zhong*, 480 F.3d at 120 n.20, 121 (citing *Sims*, 530 U.S. at 106-108; *Coleman* v. *Thompson*, 501 U.S. 722, 732 (1991)). In these circuits, courts recognize that administrative exhaustion of an issue is presumptively a prerequisite to judicial consideration of the issue, but they retain (and have exercised) discretion to consider unexhausted issues in exceptional circumstances, such as those here, where the alien presents a purely legal challenge to his removal order, the government waives any argument that the alien failed to exhaust that issue, and a miscarriage of justice would result should the court decline to reach the issue.

In *Abdelqadar*, 413 F.3d at 670-671, the Seventh Circuit, per Judge Easterbrook, considered its jurisdiction to hear a purely legal issue (whether petitioner had committed a crime of moral turpitude) that the peti-

tioner had not exhausted before the agency. Emphasizing that the government failed to raise exhaustion in its appellate brief, the court rejected the government's assertion at oral argument that issue exhaustion is a prerequisite to appellate jurisdiction over challenges to removal orders. *Id.* Describing the government's position as "lack[ing] any visible means of support," the court explained that "[c]ourts have jurisdiction over cases and controversies, not particular legal issues that affect the outcome," and it noted that "[w]e cannot imagine any reason why an agency should be forbidden, on jurisdictional grounds, to excuse an alien's failure to exhaust a particular issue." *Id.* at 671; *see also Korsunskiy*, 461 F.3d at 849 (holding that court had jurisdiction to consider unexhausted legal point because: "Exhaustion is a condition to success in court but not a limit on the set of cases that the judiciary has been assigned to resolve.... The agency therefore may waive or forfeit the exhaustion issue, something that it could not do for a genuinely 'jurisdictional' limit.").[6]

The Second Circuit has also determined that under Section 1252(d)(1), issue exhaustion is not a prerequisite to the court's jurisdiction. The court first construed the mandate that an alien "exhaust[] all administrative remedies available to the alien as of right," 8

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[6] Despite the clarity of the holdings in *Abdelqadar* and *Korsunskiy*, the Seventh Circuit has elsewhere fallen prey to some of the confusion present in other circuits regarding the nature of the issue exhaustion requirement. In *Zeqiri* v. *Mukasey*, 529 F.3d 364, 370 (7th Cir. 2008), for example, the court cited *Abdelqadar* and *Korsunskiy* but nevertheless found petitioner's "newly raised arguments ... waived and this portion of her petition ... dismissed for want of jurisdiction." The confusion both among *and* within the circuits demonstrates the need for clarification by this Court.

U.S.C. § 1252(d)(1), to require that "a decision has been rendered on [the alien's] application by an IJ and appealed to the BIA—the two administrative remedies available to [the alien] as of right," *Lin Zhong*, 480 F.3d at 118.[7] The Second Circuit then considered whether this statutory language "further requires, as a matter of *statutory jurisdiction*, that an immigration petitioner raise before the BIA all *issues* contained within his or her petition for review" or whether, instead, "the requirement of issue exhaustion is a court-imposed one that is subject to waiver" by the government. *Id.* at 118-119. Relying on this Court's direction that courts refrain from "conflating mandatory with jurisdictional prerequisites to review" and the lack of a clear statutory statement regarding issue exhaustion, the Second Circuit held that the statutory requirement of issue exhaustion is "mandatory (and hence waivable)" but is not jurisdictional. *Id.* at 107; *see id.* at 119-122 (citing *Sims*,

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[7] The Second Circuit reaffirmed this reading of Section 1252(d)(2) in *Valenzuela Grullon* v. *Mukasey*, 509 F.3d 107, 111, 112 (2d Cir. 2007), *cert. denied*, 129 S. Ct. 43 (2008), where it held that a court of appeals lacks jurisdiction over a petition for review if the alien has bypassed the BIA. The court below relied on *Valenzuela Grullon* for the proposition that there is no "'manifest injustice' exception" to Section 1252(d)'s exhaustion requirement, App. 19a (quoting *Valenzuela Grullon*, 509 F.3d at 115), but *Valenzuela Grullon* involved a situation where the alien had not appealed to the BIA at all—not, as here, where the matter was appealed to the BIA but (in the court's view) the alien had not properly preserved an issue in that appeal. *Accord Bah* v. *Mukasey*, 521 F.3d 857, 859 (8th Cir. 2008) (also relied on by the court below and also involving a situation similar to *Valenzuela Grullon* where the alien had not taken an administrative appeal before filing a petition for judicial review).

530 U.S. at 106; *Coleman*, 501 U.S. at 732; *Eberhart*, 546 U.S. at 16).[8]

B. Five Circuits Following A Supposedly "Jurisdictional" Approach Carve Out Court-Made Exceptions To The "Jurisdictional" Bar

While labeling issue exhaustion a jurisdictional requirement, five circuits (the First, Sixth, Eighth, Ninth, and Tenth) nevertheless have held or indicated that prudential exceptions exist. If exhaustion is truly jurisdictional, however, judicially-created exceptions would be foreclosed. *See, e.g., Bowles* v. *Russell*, 127 S. Ct. 2360, 2366 (2007).

The Sixth Circuit, which has, in some cases, labeled its approach "jurisdictional," *see, e.g., Ramani* v. *Ashcroft*, 378 F.3d 554, 558-560 (6th Cir. 2004), has nonetheless recognized an exception where, as in this case, the government fails to raise the issue of exhaustion. In *Al-Najar* v. *Mukasey*, 515 F.3d 708, 713 n.2 (6th Cir. 2008), the court assumed that an argument raised for the first time in a supplemental brief to the

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[8] Although the Second Circuit consistently relies on *Lin Zhong* for the proposition that issue exhaustion is not jurisdictional, Second Circuit (like Seventh Circuit) case law is not perfectly uniform. *See, e.g., Severino* v. *Mukasey*, 549 F.3d 79, 83-84 (2d Cir. 2008); *Karaj* v. *Gonzales*, 462 F.3d 113, 119 (2d Cir. 2006). This discrepancy likely results from confusion surrounding the Second Circuit's distinction—unique among the eleven circuits to have interpreted Section 1252(d)(1)—between *issue* exhaustion and *claim* exhaustion, which, under Second Circuit precedent, *is* a jurisdictional requirement. *See Lin Zhong*, 480 F.3d at 119 n.18. The Second Circuit's blurred distinction between issue and claim exhaustion, which is unsupported by the statutory language or this Court's case law, only heightens the need for clarification by this Court.

BIA was unexhausted because petitioner had failed to present the argument to the IJ, but nevertheless held that it could consider the claim given that the government "did not argue failure to exhaust on appeal." *See also Badwan* v. *Gonzales*, 494 F.3d 566, 571 (6th Cir. 2007) (Sutton, J.) ("[E]ven if we were to assume that Badwan did 'fail[]' to exhaust his administrative remedies as is required, that claim was not raised by the government on appeal and is therefore waived." (internal quotation marks omitted)).

Several other purportedly "jurisdictional" circuits have adopted or suggested the possibility of an exception to prevent a miscarriage of justice. Despite categorizing issue exhaustion as a jurisdictional requirement, *e.g.*, *Mahamat* v. *Gonzales*, 430 F.3d 1281, 1283-1284 (10th Cir. 2005), the Tenth Circuit has held that, to prevent a miscarriage of justice, the court would consider for the first time on appeal from the BIA whether the crime underlying a removal order was in fact an aggravated felony, *Batrez Gradiz* v. *Gonzales*, 490 F.3d 1206, 1209-1210 (10th Cir. 2007) (McConnell, J.)—directly the opposite of the court of appeals' decision in this case, which ruled that it had no power to undertake the very same inquiry. The Tenth Circuit explained that it would review whether the alien's crime was an aggravated felony, despite his failure to raise that issue before the BIA, because "[i]f it was not, [the alien's] conduct does not fulfill the elements necessary for deportation ... and he is, in effect, actually innocent." *Id.* at 1210.

In *Frango* v. *Gonzales*, 437 F.3d 726, 728 (8th Cir. 2006), the Eighth Circuit, rather than construing Section 1252(d)(1) as a statutory jurisdictional bar to judi-

cial consideration of unexhausted issues, as previous circuit decisions had suggested,[9] applied a traditional exhaustion analysis, "[r]egardless of whether § 1252(d)(1) precludes us from addressing unexhausted issues." *Id.* The court examined the availability of exceptions, which "help ensure that justice [is] done." *Id.* at 729. In *Sousa* v. *INS*, 226 F.3d 28, 31-32 (1st Cir. 2000), the First Circuit considered the availability of a miscarriage of justice exception. The First Circuit noted that, although courts had characterized the issue exhaustion requirement as jurisdictional, "the Supreme Court has, despite the rhetoric of jurisdiction, carved out exceptions." *Id.* at 32;[10] *cf. Sayyah* v. *Farquharson*, 382 F.3d 20, 27 (1st Cir. 2004) ("The exhaustion principle [in Section 1252(d)(1)], while strict, admits of appropriate exceptions in extraordinary instances.").

In another sign of confusion regarding the scope of the "jurisdictional" bar, the Ninth Circuit uniformly has held that issue exhaustion is a jurisdictional question, but nevertheless has created a futility exception grounded in the court's prudential exhaustion doctrine. *See Sun* v. *Ashcroft*, 370 F.3d 932, 943-944 (9th Cir. 2004). Specifically, the court interpreted the purportedly jurisdictional statutory exhaustion requirement of

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[9] *See Etchu-Njang* v. *Gonzales*, 403 F.3d 577, 583-584 (8th Cir. 2005) (noting that the court had previously referred to the issue-exhaustion requirement as jurisdictional, but also noting that court-imposed exhaustion requirements are generally not considered jurisdictional).

[10] The *Sousa* court ultimately declined to decide whether a threatened miscarriage of justice based on an improper classification of an alien as an aggravated felon would trump the exhaustion requirement because it held that the alien was, in any event, properly classified as an aggravated felon. 226 F.3d at 32-34.

remedies "available ... as of right" to exclude issues "'where the agency's position on the question ... appears already set, and it is very likely what the result of recourse to administrative remedies would be.'" *Id.* at 943 (quoting prudential exhaustion doctrine set forth in *El Rescate Legal Servs., Inc.* v. *Executive Office of Immigr. Review*, 959 F.2d 742, 747 (9th Cir. 1991)). The Ninth Circuit's wholesale adoption of a prudential exception to a supposedly jurisdictional rule suggests that that court, like several other circuits, is confused about the true nature of the exhaustion rule reflected in Section 1252(d)(2)—confusion that only this Court can dispel.

C. Among The Circuits That Follow A "Jurisdictional" Approach, Several Question It

At least three circuits (the First, Third, and Eighth) that have, at least in name, adopted a "jurisdictional" approach to issue exhaustion under Section 1252(d)(1) have nonetheless strongly questioned whether that reading of Section 1252(d)(1) is correct.[11] These three circuits have emphasized that binding precedent—rather than convincing legal reasoning—dictates their holdings that issue exhaustion is a jurisdictional requirement. *See Bin Lin* v. *Attorney Gen. USA*, 543 F.3d 114, 120-121 & n.6 (3d Cir. 2008) ("[W]hile there is reason to cast doubt upon the continuing validity of our precedent holding that issue exhaustion is a jurisdictional rule, short of a review en banc, we must dutifully apply that precedent.");

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[11] Two of these circuits—the First and the Eighth—have also considered exceptions to their "jurisdictional" rule. *See supra* pp. 17-18.

Sousa, 226 F.3d at 31 ("If we were writing on a clean slate, it would be very tempting to treat [petitioner's] forfeit of his claim as something less than a jurisdictional objection. After all, in both criminal and civil cases coming from district courts, an appellate court has the option to recognize 'plain error.'").

The Eighth Circuit, in particular, has not only expressed doubt about the correctness of its precedent, *see Etchu-Njang* v. *Gonzales*, 403 F.3d 577, 581 (8th Cir. 2005) ("If we were starting from scratch, there would be reason to question whether § 1252(d)(1) by its terms precludes a court of appeals from considering issues that an alien did not present to the agency."), but in more recent decisions, has evinced even greater uncertainty about the jurisdictional nature of Section 1252(d)(1), *see, e.g.*, *Zine* v. *Mukasey*, 517 F.3d 535, 539-540 (8th Cir. 2008) ("Our prior decisions are inconsistent on the question whether failure to raise an issue before the BIA is a jurisdictionally-fatal failure to exhaust an administrative remedy[.]"); *Frango*, 437 F.3d at 728 ("Regardless of whether § 1252(d)(1) precludes us from addressing unexhausted issues, a court-imposed exhaustion requirement is appropriate here.").

Moreover, it appears that no published decision even in the "jurisdictional" circuits—other than the Fourth Circuit's decision in this case—has actually held that a court of appeals lacks *power* to entertain a challenge to a removal order where the government has not argued that the challenge is barred because it was not properly exhausted before the agency. *Cf. Badwan*, 494 F.3d at 571 (reviewing and sustaining challenge where government did not argue exhaustion); *Lin Zhong*, 480 F.3d at 120 (stating that the "use of 'jurisdictional' language" in a case that did not "expressly consider[] the question of whether the Attorney Gen-

eral might *waive* an argument as to issue exhaustion, cannot, without more, be held to govern cases in which the government has failed to raise an exhaustion argument"). Even within the "jurisdictional" circuits, therefore, the Fourth Circuit's decision places that court at one extreme end of the debate. The decision below only exacerbates the disarray among and within the circuits regarding the operation of Section 1252(d)(1). Review by this Court is necessary to clarify the meaning of that provision.

II. THE FOURTH CIRCUIT'S RULING THAT IT LACKED JURISDICTION OVER MASSIS'S LEGAL CHALLENGE IS ERRONEOUS

The Fourth Circuit's decision is incorrect and contrary to this Court's decisions in two fundamental respects. First, Section 1252(d)(1) does not address *issue* exhaustion at all—rather, it simply requires that the alien fully proceed before the agency prior to pursuing judicial review. If the alien has unsuccessfully pursued his available remedies before the agency, then ordinary exhaustion principles apply to any issue that he raises for the first time in the court of appeals. Second, ordinary exhaustion principles are not jurisdictional. Although an alien's failure to satisfy them is not lightly to be overlooked, there are circumstances in which a court of appeals will not insist on strict compliance with exhaustion—notably, where (as here) the government does not invoke exhaustion on appeal.

A. Section 1252(d)(1) Does Not Address Issue Exhaustion

"[R]equirements of administrative issue exhaustion are largely creatures of statute." *Sims*, 530 U.S. at 107. The language of 8 U.S.C. § 1252(d)(1), however, does not address judicial review of unexhausted issues. That

provision states only that an alien must "exhaust[] all administrative remedies available to the alien as of right." *Id.* "Exhaustion of administrative remedies" typically refers to a requirement that a claimant not bypass an entire step at the agency level (including an administrative appeal) before pursuing his case in court. *See Sims*, 530 U.S. at 107 (stating that "petitioner exhausted administrative remedies by requesting review by the [Social Security Appeals] Council" and thus "nothing ... bars judicial review of her claims"); *cf. Coleman*, 501 U.S. at 731-732 (explaining that a habeas petitioner can exhaust available state court remedies even if he defaults on certain claims by failing to raise them in state court). Accordingly, several courts of appeals have held that they may not entertain a petition for review when the alien failed to proceed *at all* before either the IJ or the BIA. *See, e.g.*, *Valenzuela Gruallon* v. *Mukasey*, 509 F.3d 107, 111 (2d Cir. 2007), *cert. denied*, 129 S. Ct. 43 (2008). Once a petitioner satisfies those requirements, however, the statutory text contains no proscription against judicial review of unexhausted *issues*.

Section 1252(d)(1) makes no mention of issue exhaustion, nor does it use language of the kind necessary to require issue exhaustion. In *Sims*, this Court made clear that an *issue* exhaustion requirement should not be presumed merely from the existence of an *administrative remedies* exhaustion requirement. In determining that the Social Security Act contained no issue exhaustion requirement, the Court stated that it is "not necessarily" the case that "an issue-exhaustion requirement is 'an important corollary' of any requirement of exhaustion of remedies." 530 U.S. at 107 (citation omitted).

By contrast, in other contexts, where Congress has intended to create an issue exhaustion requirement (as opposed to an administrative remedy exhaustion requirement), Congress has plainly stated its intent by referring to "objections" rather than "remedies." For example, in *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982), this Court found that the National Labor Relations Act contains a jurisdictional issue exhaustion requirement and accordingly held that the court of appeals lacked jurisdiction to review objections that had not been raised before the National Labor Relations Board. The statute at issue in *Woelke* stated that "[n]o *objection* that has not been urged before the Board ... shall be considered by the court." 29 U.S.C. § 160(e) (emphasis added). Similarly, in *FPC* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 497-498, 501 (1955), this Court held that the court of appeals lacked authority to review unexhausted issues because the statute provided that "'[n]o *objection* to the order of the Commission shall be considered by the Court ... unless such objection shall have been urged before the Commission,'" *id.* at 497 (quoting Section 19(b) of the Natural Gas Act (emphasis added and alteration omitted)). Section 1252(d)(1) of the INA, by contrast, requires only administrative remedy exhaustion and is silent regarding the exhaustion of issues, arguments, or objections.

With the exception of their interpretation of Section 1252(d)(1) and its predecessor, 8 U.S.C. § 1105a(c) (repealed 1996), the courts of appeals have declined to read jurisdictional issue exhaustion requirements into statutes. Even where Congress has spoken in terms of "questions" not presented below, courts have construed that statutory language to codify traditional judicial exhaustion doctrines, and not as imposing a jurisdic-

tional bar. For example, the D.C. Circuit has interpreted 47 U.S.C. § 405, which explicitly requires parties to petition the FCC for rehearing before raising a new issue on judicial review, as establishing a nonjurisdictional issue exhaustion requirement, subject to the "traditionally recognized exceptions to the exhaustion doctrine." *Washington Ass'n for Television & Children* v. *FCC*, 712 F.2d 677, 681-682 & nn.6, 7 (D.C. Cir. 1983) (cited with approval in *Sims*, 530 U.S. at 108); *see also Action for Children's Television* v. *FCC*, 564 F.2d 458, 469 (D.C. Cir. 1977) (Section 405 "leaves room for the operation of sound judicial discretion to determine whether and to what extent judicial review of questions not raised before the agency should be denied" (internal quotation marks omitted)); *accord National Black Media Coal.* v. *FCC*, 791 F.2d 1016, 1021 (2d Cir. 1986).[12]

The Fourth Circuit therefore erred in reading Section 1252(d)(2) as an issue exhaustion provision. Rather, this Court's decisions make clear that the correct rule is that the requirement of "exhaustion of 'all administrative remedies available to [an] alien as of right' under 8 U.S.C. § 1252(d)(1) does not require—as a *statutory* matter—that a petitioner ... raise to the BIA each issue presented in his or her petition for judicial review." *Lin Zhong*, 480 F.3d at 121. Therefore, under Section 1252(d)(1), "the failure to exhaust individual issues before the BIA does not deprive this court

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[12] Section 405(a), which is even more direct in its exhaustion language than Section 1252(d)(1), provides: "The filing of a petition for reconsideration shall not be a condition precedent to judicial review of [an FCC decision] except where the party seeking such review ... relies on questions of fact or law upon which the Commission ... has been afforded no opportunity to pass."

of *subject matter jurisdiction* to consider those issues." *Id.* at 121-122. Whether the court of appeals may or should entertain such issues is to be determined by reference to traditional exhaustion principles.

B. Issue Exhaustion Is Not Jurisdictional

This Court's decisions make clear that, although issue exhaustion is unquestionably an important part of orderly administrative procedure, it is not an inexorable jurisdictional requirement. *E.g.*, *Sims*, 530 U.S. at 107. Even though the courts, in the absence of a statute, have in some circumstances themselves "imposed an issue-exhaustion requirement," they have done so by "analogy to the rule that appellate courts will not consider arguments not raised before trial courts." *Id.* at 108-109; *cf. United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952).

But the principle ordinarily barring consideration of an issue raised for the first time on appeal is not a jurisdictional one. This Court's cases articulating that principle "do not announce an inflexible practice," and the Court has recognized that "[t]here may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below." *Hormel*, 312 U.S. at 556, 557. After all,

> [r]ules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previ-

> ously been specifically urged would be out of harmony with this policy.

Id. at 557.

To reach its conclusion that Section 1252(d)(1) contains a jurisdictional issue exhaustion requirement, the Fourth Circuit mistakenly relied in significant part on this Court's decision in *Bowles*, 127 S. Ct. 2360. App. 16a-17a. *Bowles*, however, did not involve issue exhaustion. Rather, *Bowles* involved a situation where a party appealing an adverse decision of a district court attempted to file an appeal beyond the period allowed by statute. 127 S. Ct. at 2362. The Court ruled (as it had in prior cases) that the time limit for a notice of appeal is "mandatory and jurisdictional," *id.* at 2363 (internal quotation marks omitted), but it also noted that several recent cases had distinguished between "claims-processing rules," which are nonjurisdictional, and true jurisdictional rules, which restrict a court's power to decide a case, *see id.* at 2364; *see also Kontrick*, 540 U.S. at 452-456 (declining to read time limit for raising an issue in bankruptcy rules as jurisdictional); *Eberhart*, 546 U.S. at 15-19 (declining to read time limit for motion for new trial as jurisdictional and finding government's timeliness argument waived).

At least absent express direction by Congress to the contrary, issue exhaustion is properly understood as a nonjurisdictional "claims-processing rule." In this case, the court of appeals had jurisdiction over Massis's petitions for review under 8 U.S.C. § 1252(a)(1), which were timely filed; the only question was whether the court should address a particular issue that, it concluded, Massis had not properly preserved before the agency. The case thus resembles one in which a court of appeals has jurisdiction over a timely-filed appeal

under 28 U.S.C. § 1291 but must decide whether to address an issue not properly raised in the district court. That is a question not of appellate power but of appellate discretion.

This case thus is less analogous to *Bowles* than to *Scarborough* v. *Principi*, 541 U.S. 401 (2004). In *Scarborough*, this Court held that a 30-day deadline for filing applications for attorney's fees under the Equal Access to Justice Act (EAJA) was not jurisdictional. *Id.* at 414. As the Court explained, the case for which the claimant sought attorney's fees was already within the district court's subject matter jurisdiction; the only question was whether timeliness considerations should have barred the court from reaching a claim that arguably was not timely filed. *See id.* at 413. Like the EAJA provision at issue in *Scarborough*, the principle of issue exhaustion "does not describe what classes of cases the [court] is competent to adjudicate." *See id.* at 414 (internal quotation marks and citation omitted).

C. This Case Is An Appropriate One To Overlook Any Failure Of Issue Exhaustion

In the rare case, such as this one, where (1) the government has waived its argument that an alien has not exhausted an issue, (2) that issue is a purely legal question, and (3) manifest injustice would result from the court's failure to reach the issue, it is appropriate for a reviewing court to entertain the alien's challenge to his removal order. Wrongly shackled to a jurisdictional approach, the Fourth Circuit erroneously ignored these factors.

First, where the government does not assert that the petitioner failed to exhaust an issue, a court may deem any exhaustion requirement waived and consider

the merits of the issue. *See, e.g., Al-Najar*, 515 F.3d at 713 n.2; *Lin Zhong*, 480 F.3d 123-125; *Abdelqadar*, 413 F.3d at 670-671. Here, Massis argued in his motion to reopen that his misdemeanor reckless endangerment conviction under Maryland law does not constitute an "aggravated felony" under the INA. *See* App. 7a. He again asserted this argument in his petition for review to the Fourth Circuit. App. 8a-9a. Neither in its response to Massis's motion to reopen nor in its answering brief in the Fourth Circuit did the government argue that Massis had waived this issue. Under these circumstances, a court of appeals may and should exercise its discretion to hold the government to its waiver and consider the merits of the petitioner's argument.

Second, an exception is warranted when no facts are in dispute and the issue is solely one of statutory interpretation. *See McKart* v. *United States*, 395 U.S. 185, 197-198 & n.15 (1969) (addressing issue not previously raised to relevant administrative authority because issue was "solely one of statutory interpretation" and "no further factual inquiry would have been at all useful"); *Abdelqadar*, 413 F.3d at 670-672 (addressing the merits of an unexhausted issue that was "strictly legal").

Here, no material facts are in dispute, and the central substantive issue presented on appeal is a pure question of legal interpretation that appellate courts routinely decide without deferring to the BIA: whether Massis is subject to removal as an "aggravated felon" under 8 U.S.C. § 1101(a)(43)(F) on the basis of his 1995 misdemeanor reckless endangerment conviction in Maryland. *See e.g., Bobb* v. *United States Att'y Gen.*, 458 F.3d 213, 217 n.4 (3d Cir. 2006) (declining to give *Chevron* deference to BIA's determination of whether a particular criminal offense is an aggravated felony be-

cause that determination involves "matters outside the authority or expertise of the BIA"); *Soliman* v. *Gonzales*, 419 F.3d 276, 281 (4th Cir. 2005) (stating that courts of appeals need not defer to the agency's conclusion that a particular offense constitutes an aggravated felony because that question does not "lie[] within the BIA's authority or expertise"). Furthermore, the resolution of the legal issue here is plain: Massis is not removable because reckless endangerment is not a crime of violence and therefore not an aggravated felony that can serve as the basis for his removal. *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 (2004). Indeed, the government conceded this fundamental point below by not arguing in the court of appeals that Massis is removable as an aggravated felon.

Third, courts may make an exception "to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below" when "injustice might otherwise result." *Hormel*, 312 U.S. at 557; *see also Batrez Gradiz*, 490 F.3d at 1209-1210 (invoking "miscarriage of justice" exception under Section 1252(d) to decide whether petitioner had committed an aggravated felony and hence was removable despite petitioner's failure to raise that issue to BIA); *Sousa*, 226 F.3d at 31-32 (suggesting that reviewing court could excuse failure to exhaust an issue under Section 1252(d) in "extreme cases" to avoid "a miscarriage of justice"). Here, a miscarriage of justice would result if Massis were removed as an "aggravated felon" when it is undisputed that he did not commit a crime satisfying that statutory definition.

The miscarriage of justice in Massis's case is all the more compelling because Massis *did*, in fact, raise this argument before the BIA when he asked the BIA to use its *sua sponte* power to reopen the proceedings to

prevent a miscarriage of justice, stating that "whether or not Respondent's counsel was constitutionally ineffective, it is clear that Respondent is not deportable as charged." CAJA 331. The motion to reopen was timely filed after the BIA ordered Massis's removal and Massis, upon retaining current counsel, learned of his statutory ineligibility for removal. *See supra* p. 6.

Although the Fourth Circuit concluded that Massis did not exhaust this issue, the court cited no support for its view that a claim is unexhausted if raised before the BIA in a motion to reopen. The Fourth Circuit's holding is contrary to well-established Fifth Circuit precedent that "[a]n alien fails to exhaust his administrative remedies with respect to an issue when the issue is not raised in the first instance before the BIA—either on direct appeal *or* in a motion to reopen." *Kuang-Ze Wang* v. *Ashcroft*, 260 F.3d 448, 452-453 (5th Cir. 2001) (emphasis added); *see also Roy* v. *Ashcroft*, 389 F.3d 132, 136-137 (5th Cir. 2004). The Fourth Circuit's position also runs afoul of Section 1252(d)(1)'s purpose, which is simply "to give the BIA an opportunity to address [the alien's] arguments before presenting them to th[e] court." *Padilla* v. *Gonzales*, 470 F.3d 1209, 1214 (7th Cir. 2006). To fulfill this purpose, the "paramount concern ... is that (1) the petitioner raise the issue, *or* (2) the BIA actually decide the issue." *Sidabutar* v. *Gonzales*, 503 F.3d 1116, 1121 (10th Cir. 2007). Massis gave the BIA ample opportunity to correct its error by raising this issue in his motion to reopen as soon as he learned of it, and he therefore satisfied Section 1252(d)'s exhaustion requirement.

III. THE FOURTH CIRCUIT IMPROPERLY REFUSED TO CONSIDER MASSIS'S CONSTITUTIONAL INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

The court of appeals summarily concluded that its decision in *Afanwi* v. *Mukasey*, 526 F.3d 788 (4th Cir. 2008), in which it held that aliens have no right under the Due Process Clause of the Fifth Amendment to effective assistance of retained counsel in removal proceedings, foreclosed Massis's due process claim based on the deficient representation he received from prior counsel. App. 13a-14a.[13] The Fourth Circuit's precedent places it in the minority of circuits that have addressed that issue. Only two circuits—the Fourth and Eighth—plainly reject a constitutional right to effective assistance of counsel under the Due Process Clause in removal proceedings. *See Afanwi*, 526 F.3d at 799; *Rafiyev* v. *Mukasey*, 536 F.3d 853, 861 (8th Cir. 2008). By contrast, seven circuits (the First, Second, Third, Sixth, Ninth, Tenth, and Eleventh) recognize that the right to a fundamentally fair hearing, guaranteed by the Fifth Amendment Due Process Clause, encompasses the right to effective assistance of retained counsel during removal proceedings. *See Lozada* v. *INS*, 857 F.2d 10, 13 (1st Cir. 1988); *United States* v. *Perez*, 330 F.3d 97, 101 (2d Cir. 2003); *Fadiga* v. *Attorney Gen. USA*, 488 F.3d 142, 155 (3d Cir. 2007); *Huicochea-Gomez* v. *INS*, 237 F.3d 696, 699 (6th Cir. 2001); *Ray* v. *Gonzales*, 439 F.3d 582, 587 (9th Cir. 2006);

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[13] The Fourth Circuit reviewed, under a highly deferential abuse of discretion standard, the BIA's rejection of Massis's ineffective assistance of counsel claim. App. 11a. In so doing, it expressly did *not* address ineffective assistance as a *constitutional* matter, noting that any such claim was foreclosed by circuit precedent. App. 13a-14a.

Osei v. *INS*, 305 F.3d 1205, 1208 (10th Cir. 2002); *Dakane* v. *United States Att'y Gen.*, 399 F.3d 1269, 1273 (11th Cir. 2005).[14] A violation of this constitutional right occurs if the alien is prejudiced by counsel's deficient performance. *E.g.*, *Perez*, 330 F.3d at 101-102; *Fadiga*, 488 F.3d at 155.

In a pending petition for certiorari, Joseph Afanwi has asked the Court to resolve this sharp conflict among the circuits. *See* Pet., *Afanwi* v. *Holder*, (U.S. Jan. 16, 2009) (No. 08-906). Because this Court's disposition of Afanwi's petition may affect the outcome of this matter, this Court at a minimum should hold in abeyance this petition until the Court has decided whether to grant the petition in *Afanwi*.

In the interest of judicial economy, Massis adopts and incorporates by reference the legal arguments and reasons for granting a writ of certiorari set forth in the *Afanwi* Petition, namely: (1) there is a compelling interest in national uniformity with respect to the due process rights of aliens in removal proceedings, and (2) the Due Process Clause of the Fifth Amendment entitles aliens facing removal to a fundamentally fair hearing, which necessarily entails a constitutional guarantee of competent assistance of counsel. *See Afanwi* Pet. 15-27. If this Court concludes—as a majority of circuits have—that ineffective assistance of retained counsel in

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[14] The Seventh Circuit has issued conflicting decisions on this question. *See, e.g.*, *Castaneda-Suarez* v. *INS*, 993 F.2d 142, 144 (7th Cir. 1993) (recognizing due process right); *Magala* v. *Gonzales*, 434 F.3d 523, 525 (7th Cir. 2005) (denying due process right); *Sanchez* v. *Keisler*, 505 F.3d 641, 647 (7th Cir. 2007) (finding that right to effective assistance in removal proceedings is "derived ... ultimately [from] the Fifth Amendment's due process clause").

the removal context violates an alien's Fifth Amendment due process rights, this Court should grant Massis's petition, vacate the Fourth Circuit's denial of that claim, and remand for further proceedings.

Massis has a meritorious constitutional claim of ineffective assistance of counsel based on his concession of deportability. At the time Massis's former counsel conceded deportability in 1998, it was clear under Maryland law that misdemeanor reckless endangerment did not meet the definition of a "crime of violence" under 18 U.S.C. § 16. That provision states that a crime of violence required "the use, attempted use, or threatened use of physical force" as an element of the offense, *id.* § 16(a), or that the offense be a "felony" and involve "by its nature ... a substantial risk" that physical force may be used in the commission of the offense, *id.* § 16(b). Reckless endangerment does not have as an element the use of force, nor does it involve a substantial risk that force will be used in committing the offense. *See* Md. Ann. Code art. 27, § 120(a) (1995); *Minor* v. *State*, 605 A.2d 138, 141 (Md. 1992) (establishing that reckless endangerment does not require or inherently involve the use of force).[15] Reckless endangerment, therefore, is not a federally defined "crime of violence" and cannot constitute an "aggravated felony" under the INA. *See Leocal*, 543 U.S. at 11.

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[15] The law of the Fourth Circuit was clear as far back as 1993 that an assessment of whether an offense qualifies as a "crime of violence" under Section 16 required application of a categorical approach that considers the inherent nature of the offense rather than a particular defendant's conduct. *See United States* v. *Aragon*, 983 F.2d 1306, 1313 (4th Cir. 1993).

Moreover, reckless endangerment is a *misdemeanor*, not a felony, under Maryland law. *See supra* p. 4. Accordingly, Maryland's reckless endangerment offense cannot, as a matter of law, constitute a "felony" within the meaning of that term in 18 U.S.C. § 16(b) and cannot serve as the basis for removal as an "aggravated felony" under the INA. *See, e.g., Francis* v. *Reno*, 269 F.3d 162, 168-170 (3d Cir. 2001) (holding that Section 16(b) applies only to crimes classified as felonies under state law); *see also Singh* v. *Gonzales*, 432 F.3d 533, 538 (3d Cir. 2006) (holding that Pennsylvania's reckless endangerment offense, which is a misdemeanor, could not constitute a "felony" under Section 16(b)).

Equally plain is that Massis's counsel's concession resulted in prejudice because the concession deprived Massis of an absolute defense to deportability and now serves as the sole basis for his unlawful deportation order. It is at least "reasonabl[y] probab[le]," *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984), that, had Massis's counsel argued to the IJ that Massis's offense was not one that rendered him deportable, the IJ would have agreed. Massis was, therefore, prejudiced by his counsel's ineffective representation.[16]

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[16] The Fourth Circuit's statement that counsel's concession "is particularly understandable in light of counsel's decision to seek equitable relief in the form of a discretionary waiver of the deportation," App. 13a, is incorrect. There was no need or advantage for Massis's counsel to choose between contesting deportability and requesting a Section 212(c) waiver. Aliens in removal proceedings frequently both challenge the charge of deportability and request discretionary relief from removal. *See, e.g., Matter of Brieva-Perez*, 23 I. & N. Dec. 766, 766 (BIA 2005); *Matter of Saint John*, 21 I. & N. Dec. 593, 594 (BIA 1996). Neither the immigration laws

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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nor the facts of this case inhibited Massis's counsel from pursuing both arguments in the alternative. *Cf. INS* v. *Doherty*, 502 U.S. 314, 328 (1992) ("Precisely because an alien may qualify for one form of relief from deportation, but not another, the INS allows aliens to plead in the alternative in immigration proceedings."). Moreover, because a successful challenge to the basis for Massis's deportability would have resulted in a bar to his removal, there could not have been any tactical advantage in conceding the one point that could have provided Massis with an absolute defense to deportability and instead seeking a form of relief that is merely discretionary.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-1329

NIMATALLAH SHAFIK MASSIS, *Petitioner*,

v.

MICHAEL B. MUKASEY, UNITED STATES ATTORNEY GENERAL, *Respondent*.

No. 05-1851

NIMATALLAH SHAFIK MASSIS, *Petitioner*,

v.

MICHAEL B. MUKASEY, UNITED STATES ATTORNEY GENERAL, *Respondent*.

ON PETITIONS FOR REVIEW OF ORDERS OF
THE BOARD OF IMMIGRATION APPEALS.

No. 05-6981

NIMATALLAH SHAFIK MASSIS, *Petitioner-Appellant*,

v.

MICHAEL CHERTOFF, SECRETARY OF HOMELAND SECURITY; MICHAEL J. GARCIA, ASSISTANT SECRETARY; CALVIN MCCORMICK, INTERIM FIELD OFFICE DIRECTOR; MICHAEL B. MUKASEY, UNITED STATES ATTORNEY GENERAL, *Respondents-Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT GREENBELT. PETER J. MESSITTE, DISTRICT JUDGE. (CA-05-1242-8-PJM)

Argued Sept. 24, 2008

Decided Dec. 9, 2008

[549 F.3d 631]

* * *

[632] ARGUED: Rachel Stutz, Wilmer, Cutler, Pickering, Hale & Dorr, L.L.P., Washington, D.C., for Petitioner/Appellant. Woei-Tyng Daniel Shieh, United States Department Of Justice, Washington, D.C., for Respondents/Appellees. **ON BRIEF:** Paul R.Q. Wolfson, Victoria S. Shabo, Wilmer, Cutler, Pickering, Hale & Dorr, L.L.P., Washington, D.C., for Petitioner/Appellant. Jeffrey S. Bucholtz, Acting Assistant Attorney General, Civil Division, Susan K. Houser, Senior Litigation Counsel, United States Department Of Justice, Office of Immigration Litigation, Washington, D.C., for Respondents/Appellees.

Before NIEMEYER, KING, and DUNCAN, Circuit Judges.

Denied in part and dismissed in part by published opinion. Judge DUNCAN wrote the opinion, in which Judge NIEMEYER and Judge KING joined.

DUNCAN, Circuit Judge:

The petitioner, Nimatallah Shafik Massis, is a Jordanian national and a permanent resident of the United States. On February 25, 2005, the Board of Immigration Appeals ("BIA") found that Massis was deportable as an aggravated felon and that he did not qualify for a discretionary waiver of deportation under former section 212(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(c).[1] In these consolidated actions, Massis seeks review of the BIA's removal order on two grounds. First, Massis raises a claim of ineffective assistance of counsel based on his counsel's decision to concede deportability for Massis's June 6, 1995 conviction of reckless endangerment. Second, Massis argues that reckless endangerment is not a "crime of violence" and thus cannot form the basis of his deportation as an **[633]** aggravated felon. For the reasons that follow, we deny in part and dismiss in part the petitions for review.

I.

Massis was admitted to the United States as a lawful permanent resident on November 20, 1974. Evi-

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[1] Section 212 was repealed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 304(b), 110 Stat. 3009, 3598-97.

dence in the record shows that Massis had a history of hitting and pushing his wife, Hilda Massis. J.A. 54, 239. Massis and his wife eventually divorced in 1996.

On February 3, 1995, Massis was arrested after chasing his wife and two young girls with an ax in a residential neighborhood. Hilda Massis told the responding police officer that Massis "chased her up Parkland Drive screaming[,] 'I'm going to kill you,' while holding a wood ax above his head." J.A. 53. While in pursuit, Massis fell to the ground and Hilda Massis and the two girls were able to run into a neighbor's house for safety. The police report filed for the incident included statements from witnesses affirming that "if Nimatallah did not fall, he would have killed her." J.A. 54. At the time of his arrest, Massis was under a court order to avoid contact with Hilda Massis, although he had repeatedly violated this order and had declared in a Maryland state court proceeding that "even with a divorce, he would always consider himself married to his wife." J.A. 280.

On March 3, 1995, Massis was charged with intent to murder, carrying a weapon openly with intent to injure, criminal contempt and reckless endangerment. On June 6, 1995, he pled guilty to one count of reckless endangerment and one count of criminal contempt and was sentenced to five years imprisonment.[2] On June

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[2] At the time of Massis's conviction, the Maryland Code defined reckless endangerment as follows:

> (a) Any person who recklessly engages in conduct that creates a substantial risk of death or serious physical injury to another person is guilty of the misdemeanor of reckless endangerment and on conviction

28, 1996, the Immigration and Naturalization Service initiated removal proceedings against Massis under 8 U.S.C. § 1227(a)(2)(A)(iii), which states that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable."[3] Represented by counsel at a merits hearing before an immigration judge ("IJ") on December 31, 1998, Massis conceded deportability as an aggravated felon based on his reckless endangerment conviction. He sought a waiver of deportation under 8 U.S.C. § 1182(c), which the IJ eventually granted on March 19, 2003.[4] **[634]** Although the IJ

> is subject to a fine not exceeding $5,000 or imprisonment not exceeding 5 years or both.

Md. Code Ann. art. 27, § 120 (1995).

[3] At the time of Massis's removal proceeding, an "aggravated felony" included any "crime of violence (as defined in section 16 of Title 18 . . .) for which the term of imprisonment imposed (regardless of any suspension of imprisonment) is at least 5 years." Immigration and Nationality Technical Corrections Act of 1994, Pub. L. 103-416, § 222, 108 Stat. 4305, 4320-21 (1994) (current version at 8 U.S.C. § 1101(a)(43)(F)).

Title 18 U.S.C. § 16 defines a "crime of violence" as follows:

> (a) an offense that has an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

This definition was in force at the time of Massis's removal proceeding. *See* Pub. L. No. 98-473, Title II, § 1001(a), 98 Stat. 2136 (1984).

[4] Former section 212(c) of the Immigration and Naturalization Act gave the Attorney General authority to grant discretion-

noted that Massis "has a history of battering his wife and convictions which are related to his [spousal] abuse and inability or unwillingness to conform to acceptable standards of conduct," J.A. 240, the IJ found that Massis suffered from mental illness and that "his actual behavior since his incarceration is strongly indicative of rehabilitation," *id.* at 241. The IJ concluded that "[i]t would be unconscionable to 'discard' [Massis], who has been so troublesome because of his mental illness, by jettisoning him into a violent region of the world where he will have inadequate support for his mental illness." *Id.* at 242.

The Department of Homeland Security ("DHS") appealed the IJ's decision to the BIA. On appeal, Massis was represented by different counsel. The BIA vacated, the IJ's grant of section 212(c) relief on February 25, 2005, holding that Massis had not "demonstrated extraordinary circumstances that might warrant relief." J.A. 281. The BIA noted that the IJ's concern about "the supposed unavailability of psychiatric care in Jordan" was "not supported by persuasive facts" and emphasized that Massis had failed to accept responsibility for a "violent history about which he expresses little remorse." *Id.* The BIA found that Massis had "not shown himself to be a desirable resident of the United States" and ordered Massis deported to Jordan. *Id.* Massis filed a timely petition for review of the BIA's deportation order on March 25, 2005. J.A. 282.

Massis retained a third counsel and filed a petition for a writ of habeas corpus in the United States District

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ary admission to certain aliens subject to deportation. *See generally Singh v. Keisler*, 255 F. App'x 710, 713-14 (4th Cir. 2007) (unpublished).

Court for the District of Maryland on May 5, 2005, seeking "declaratory and injunctive relief to enjoin his imminent removal from the United States." J.A. 302-12. On June 27, 2005, the district court transferred the case to this court under section 106(a) of the REAL ID Act of 2005, which vests jurisdiction over such habeas petitions in the courts of appeals.[5] Both parties consented to the transfer order.

In addition to his habeas petition, Massis filed a motion to reconsider and reopen with the BIA on May 25, 2005, asserting a claim for ineffective assistance of counsel based on his first counsel's concession of deportability at his 1998 removal hearing. J.A. 318-33. Relying on *Leocal v. Ashcroft*, 543 U.S. 1 (2004), Massis also argued that reckless endangerment did not constitute a crime of violence and that his conviction should not have subjected him to removal proceedings. The

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[5] Section 106(a) of the REAL ID Act states as follows:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e) of this section. For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of Title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

8 U.S.C. § 1252(a)(5).

BIA denied this motion on July 26, 2005, on the ground that Massis had failed to "file a motion to reopen within a reasonable period of the alleged ineffective assistance." J.A. 364. In denying the motion, the BIA noted that Massis "had an opportunity to file a motion to remand proceedings based on inef-**[635]**fective assistance of counsel while his case was on appeal, but failed to do so" and instead "waited until almost 3 months after our February 25, 2005, decision to raise his ineffective assistance of counsel claim." *Id.* Massis filed a timely petition for review of the BIA's decision to deny his motion to reconsider and reopen on August 19, 2005. J.A. 370-72.

The following three petitions were consolidated for purposes of appeal:

- 05-1329, Massis's petition for review of the BIA's deportation order
- 05-6981, Massis's petition for a writ of habeas corpus
- 05-1851, Massis's petition for review of the BIA's decision to deny Massis's motion to reopen and reconsider

II.

In each of his petitions, Massis seeks to revisit his original counsel's concession of deportability on two grounds. First, he raises a due process claim, arguing that his counsel's concession of deportability in the 1998 removal hearing amounted to ineffective assistance. He argues that the BIA improperly denied his motion to reopen his case to consider this claim and asks this court to find that his counsel's ineffective assistance violated his due process rights. Second, Massis argues that this court may consider "the ultimate substantive

question" of whether reckless endangerment constitutes a crime of violence—and whether Massis is removable—because the issue is "purely legal in nature" and because "[i]t would be a profound miscarriage of justice to remove him without either the agency or this Court considering the fundamental question of whether he is removable." Petitioner's Br. at 13.

Massis's arguments on appeal arise out of the recent Supreme Court decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004). In *Leocal*, the Supreme Court addressed whether a conviction of driving under the influence of alcohol ("DUI") constituted a crime of violence under 18 U.S.C. § 16. The Court held that a crime of violence involves a "substantial risk" of "using physical force against another person in the course of committing the offense" and found that a DUI under Florida law did not qualify as a crime of violence for the purposes of determining the petitioner's removability. 543 U.S. at 11 (internal quotations omitted). Massis cites *Minor v. State*, 605 A.2d 138 (Md. 1992), and related cases to argue on appeal that the Maryland courts have held that reckless endangerment under Maryland law "does not require proof of any violent or forceful act of the defendant." Petitioner's Br. at 21. Although Massis conceded deportability based on his reckless endangerment conviction and failed to challenge this concession before the IJ or the BIA, Massis now contends that reckless endangerment under Maryland law does not qualify as a crime of violence under 18 U.S.C. § 16(b) and that he is not a convicted aggravated felon subject to deportation under 8 U.S.C. § 1227(a)(2)(A)(iii). He argues that his original counsel's decision to concede deportability amounted to ineffective assistance of counsel. He further contends that this court can and should examine whether reckless endangerment under

Maryland law constitutes a crime of violence that can support a deportation order. We consider each argument in turn.

A.

Massis did not attempt to assert his ineffective assistance of counsel claim until several months after the BIA found that he did not qualify for a discretionary waiver of deportability under former section 212(c) and ordered him deported to Jor-**[636]**dan.[6] He now raises this claim in each of his petitions for review, arguing that his counsel's concession of deportability in the 1998 removal hearing was "plainly ineffective." Petitioner's Br. at 32. He further argues that because his counsel's ineffective assistance resulted in prejudice, the BIA's decision to deny his motion to reopen and reconsider was arbitrary and capricious. The DHS argues in response that "it was reasonable, as the law stood in 1998, [for Massis's original counsel] to conclude his crime was an aggravated felony" and that such a concession did

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[6] Massis also argues that in reversing the IJ's decision to grant a discretionary waiver, the BIA erroneously applied the wrong standard of review to the IJ's factual findings and failed to consider all the evidence, as required by its past precedent. This argument is unavailing. The BIA properly stated that it reviews "the discretionary determination made by the Immigration Judge *de novo*." J.A. 279; *see also* 8 C.F.R. § 1003.1(d)(3)(ii). Although Massis correctly points out that the BIA must review factual findings under a clearly erroneous standard, *see* 8 C.F.R. § 1001.1(d)(3)(i), the Supplementary Information to section 1003.1 makes clear that this standard only applies to the factual determination of "'what happened' to the individual." Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,888-90 (Aug. 26, 2002). In contrast, application of the law to those facts—to determine, for example, whether those facts amount to "exceptional and extremely unusual hardship"—may be reviewed *de novo*. *See id.*

not amount to ineffective assistance because it was not "so egregious that it rendered the hearing unfair." Respondent's Br. at 12. The DHS further argues that the BIA did not abuse its discretion in determining that Massis failed timely to raise his ineffective assistance of counsel claim. We agree.

The BIA's denial of a motion to reopen is reviewed for an abuse of discretion and should be reversed only if the decision is arbitrary, capricious, or contrary to law. *Afanwi v. Mukasey*, 526 F.3d 788, 794 (4th Cir. 2008) (citing *Immigration & Naturalization Serv. v. Doherty*, 502 U.S. 314, 323-24 (1992); *Barry v. Gonzales*, 445 F.3d 741, 744-45 (4th Cir. 2006)). "The BIA's denial of a motion to reopen is reviewed with extreme deference, given that motions to reopen are disfavored because every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *Barry*, 445 F.3d at 744-45 (citing *Stewart v. Immigration & Naturalization Serv.*, 181 F.3d 587, 596 (4th Cir. 1999)) (internal quotations and punctuation omitted).

In light of that standard, we first consider Massis's contention that his initial counsel's concession of deportability in the 1998 removal hearing was plainly ineffective. Citing *In re B-B-*, 22 I. & N. Dec. 309 (BIA 1998), for the proposition that a reasonable tactical decision by counsel cannot constitute ineffective assistance of counsel, the BIA rejected this argument. We cannot conclude that the BIA abused its discretion in doing so. The state of the law as it existed at the time of Massis's removal hearing supports the BIA's determination. Accord *Mbea v. Gonzales*, 482 F.3d 276, 281 (4th Cir. 2007) (noting that the law "then in effect" at the time of an alien's conviction would apply to the

alien's removal proceedings (citing *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289 (2001))).

In 1998, the BIA had not addressed the question of whether reckless endangerment under Maryland law qualified as a crime of violence. Its precedent at that time had established that a crime of violence under 18 U.S.C. § 16(b) required a "risk of harm," but did not require a substantial risk that physical force may be used in the commission of an offense. For **[637]** example, in *In re Alcantar*, 20 I. & N. Dec. 801 (BIA 1994), the BIA stated that 8 U.S.C. § 16 defines offenses that have "the potential of resulting in harm," such that "[o]nce the court determines that the defendant has been convicted of a crime that usually involves a risk of harm, the inquiry ends; it does not matter whether that risk has matured into actual harm." *Id.* at 809. *See also In re Magallanes-Garcia*, 22 I. & N. Dec. 1, 4 (BIA 1998) (holding that a crime of violence "must have 'the potential of resulting in harm'" (citation omitted)).

Federal courts of appeals subsequently began to reach a contrary conclusion, holding that a crime of violence requires a substantial likelihood that the perpetrator will intentionally employ physical force. *See, e.g.*, *Dalton v. Ashcroft*, 257 F.3d 200, 207-08 (2d Cir. 2001); *United States v. Hernandez-Castellanos*, 287 F.3d 876, 881 (9th Cir. 2002). The BIA also revisited the issue in *In re Luis Manuel Ramos*, 23 I. & N. Dec. 336, 336 (BIA 2002), holding that a DUI is not a crime of violence because it does not involve a substantial risk that physical force may be used in the commission of the offense. The Supreme Court, however, did not adopt that view until 2004. *See Leocal*, 543 U.S. at 11.

Given the state of the law in 1998, it was not unreasonable for Massis's original counsel to concede deport-

ability based on the Maryland reckless endangerment statute, which stated that any person who "recklessly engages in conduct that creates *a substantial risk of death or serious physical injury*" is guilty of reckless endangerment. Md. Code Ann. art. 127, § 120 (1995) (emphasis added). Such a concession is particularly understandable in light of counsel's decision to seek equitable relief in the form of a discretionary waiver of the deportation, which the IJ in fact granted. Massis has not shown that the BIA abused its discretion in refusing to allow Massis to revisit his concession of deportability by asserting an ineffective assistance of counsel claim.

Moreover, Massis has not shown that the BIA abused its discretion in denying his motion to reopen and reconsider. Under 8 C.F.R. § 1003.2(a), "[t]he decision to grant or deny a motion to reopen . . . is within the discretion of the Board." In denying Massis's motion, the BIA noted that Massis "chose to solely respond to the DHS's appeal" of the IJ's grant of section 212 relief; failed to file a motion to remand proceedings based on ineffective assistance while his case was on appeal; and delayed "until almost 3 months after [the BIA's] February 25, 2005 decision to raise his ineffective assistance of counsel claim." J.A. 363-64. Although Massis argues that he had no reason to enlarge the scope of the DHS's appeal of the section 212 waiver, he has not shown that the BIA abused its discretion in denying his motion to reopen and reconsider as untimely.

Finally, with respect to all of Massis's petitions for review, our recent decision in *Afanwi* forecloses Massis's due process claim based on ineffective assistance of counsel. In *Afanwi*, we held that an alien's "counsel's actions do not implicate the Fifth Amendment," such that the counsel's alleged ineffectiveness does "not de-

prive [an alien] of due process." 526 F.3d at 799 (noting that the alien's counsel "was not a state actor" and there was no "sufficient nexus between the federal government and counsel's ineffectiveness" to treat the counsel's actions as governmental action). Under *Afanwi*, Massis cannot assert an ineffective assistance of counsel claim to challenge his concession of deportability in 1998.

For the foregoing reasons, Massis's due process claim based on ineffective assistance of counsel is denied.

[638] B.

Massis also seeks to revisit his original concession of deportability on the substantive ground that reckless endangerment does not constitute a crime of violence under 18 U.S.C. § 16(b), rather than through the portal of an ineffective assistance of counsel of claim. He argues that after *Leocal*, under Maryland law reckless endangerment can no longer be considered a crime of violence to support a deportation order. Massis does not dispute that he failed to raise the issue before either the IJ or the BIA. Relying on *Zhong v. United States Department of Justice*, 480 F.3d 104, 121-22 (2d Cir. 2007), Massis contends that "failure to exhaust individual issues before the BIA does not deprive [a court of appeals] of subject matter jurisdiction to consider those issues." *Id.* at 122. Massis further argues that this court may consider the issue because this court has "discretion to decide a purely legal issue not ruled on below when a miscarriage of justice will result from the court's failure to act." Petitioner's Br. at 39. In light of recent Supreme Court precedent, however, we are constrained to disagree.

Title 8 U.S.C. § 1252(d)(1) states that "[a] court may review a final order of removal only if the alien has exhausted all administrative remedies to the alien as of

right." We have previously interpreted this provision as a jurisdictional bar. In other words, under 8 U.S.C. § 1252(d)(1), an alien's failure to dispute an issue on appeal to the BIA constitutes a failure to exhaust administrative remedies that bars judicial review. In *Kurfees v. Immigration & Naturalization Service*, 275 F.3d 332 (4th Cir. 2001), we found that we had no jurisdiction to consider the habeas petition of an alien who had failed to appeal her 1993 deportation order and a 1997 denial of her motion to reopen. *Id.* at 336 ("It is well settled that parties must exhaust their administrative remedies before filing suit in federal court. . . . And we have held that district courts lack jurisdiction over the claims of aliens who have failed to exhaust their administrative remedies."); *see also Asika v. Ashcroft*, 362 F.3d 264, 267 n.3 (4th Cir. 2004) ("We have no jurisdiction to consider this argument, however, because [the alien] failed to make it before the Board and, therefore, failed to exhaust 'all administrative remedies.'" (citations omitted)).

We are not alone in regarding section 1252(d)(1) as imposing a jurisdictional hurdle; many of our sister circuits have held similarly. The First Circuit held in *Sunoto v. Gonzales*, 504 F.3d 56, 57 (1st Cir. 2007), that it lacked jurisdiction to review the BIA's decision on issues that an alien had failed to raise in his appeal before the BIA. Similarly, the Seventh Circuit has noted that the jurisdiction of the courts of appeals "is limited to direct review of final orders of removal and matters decided by ICE in the course of removal proceedings." *Fonseca-Sanchez v. Gonzales*, 484 F.3d 439, 443 (7th Cir. 2007). Other courts of appeals have held likewise. *See Heaven v. Gonzales*, 473 F.3d 167, 177 (5th Cir. 2006) ("[The alien] did not raise this issue before the BIA. . . . Consequently, [the alien] did not exhaust his administrative remedies with respect to this claim, and we lack jurisdic-

tion to entertain it on appeal."); *Bonhometre v. Gonzales*, 414 F.3d 442, 447-48 (3d Cir. 2005) ("As a general rule, an alien must exhaust all administrative remedies *available to him as of right* before the BIA as a prerequisite to raising a claim before us. . . . [The alien's] procedural due process claims thus could have been argued before the BIA, and his failure to do so is thus fatal to our jurisdiction over this petition." (citations omitted)); *accord Frango v. Gonzales*, 437 F.3d 726 (8th Cir. 2006) (finding that "Congress likely in-**[639]**tended by enacting § 1252(d)(1) to continue to require that an alien not only pursue all stages of administrative review, but also raise all issues before the agency"). *But cf. Bangura v. Hansen*, 434 F.3d 487, 494 (6th Cir. 2006) (noting that "[i]n the immigration context, several circuits have indicated that constitutional challenges to the INA and INS procedures and some due process claims do not require exhaustion because the BIA does not have the power to adjudicate these claims" and collecting authorities (citations and internal punctuation omitted)).

Massis relies on *Zhong v. United States Department of Justice*, 480 F.3d 104 (2d Cir. 2007), for the proposition that failure to exhaust individual issues before the BIA does not deprive the court of appeals of subject matter jurisdiction. The Second Circuit, however, has since retreated from that position. In *Grullon v. Mukasey*, 509 F.3d 107 (2d Cir. 2007), the Second Circuit noted that "[s]ubsequent to *Lin Zhong*, the Supreme Court" held in *Bowles v. Russell*, 127 S. Ct. 2360 (2007), that "when an appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction." 509 F.3d at 111-12 (citing *Bowles*, 127 S. Ct. at 2366). In *Bowles*, the Supreme Court held that a court of appeals had no jurisdiction to consider an un-

timely habeas appeal. The *Bowles* Court found that "[b]ecause Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them." 127 S. Ct. at 2365 (citation omitted). Applying *Bowles* to the administrative exhaustion requirement of 8 U.S.C. § 1252 (d)(1), the *Grullon* court noted:

> Congress has instructed the courts that they may not review a final order of removal unless the alien has appealed to the BIA. When an exhaustion requirement is statutory and evinces an intent to constrict the ability of courts to adjudicate a class of cases, the limitation is jurisdictional, rather than mandatory only . . . . [B]ecause [such an exhaustion requirement] is a *statutory* limit on the Court's power, it is jurisdictional, not merely mandatory.

509 F.3d at 112 (citing *Magtanong v. Gonzales*, 494 F.3d 1190, 1191 (9th Cir. 2007)); *see also Ruiz-Martinez v. Mukasey*, 516 F.3d 102, 117-19 (2d Cir. 2008) (finding that the court lacked jurisdiction over an untimely petition for review of a final removal order). Under 8 U.S.C. § 1252(d)(1), Massis may not raise an issue on appeal that he did not previously raise before the IJ and BIA. This court has no jurisdiction to consider his argument that reckless endangerment does not constitute a crime of violence.

Massis argues that he had no reason to raise the issue of deportability before the BIA because the DHS appealed a separate issue—the IJ's grant of section 212(c) relief—and "there would have been no reason for Mr. Massis's counsel to enlarge the scope of the appeal or to file a cross-appeal." Petitioner's Br. at 36. This argument is not persuasive. Courts have found that an

alien's failure to dispute an issue before an IJ also constitutes a failure to exhaust administrative remedies. *See, e.g., Martinez-Castano v. U.S. Attorney Gen.*, 291 F. App'x 270, 271 (11th Cir. 2008) (unpublished) (noting that because the alien "did not raise with the IJ his asylum and withholding-of-removal claims based on his political opinion . . . he did not exhaust his administrative remedies" and the court "lack[ed] jurisdiction to consider his claims"); *Gonzalez-Rios v. Mukasey*, 289 F. App'x 206, 207 (9th Cir. 2008) (unpublished) (finding that the alien "did not raise this argument [that his con-**[640]**viction under a California statute 'was not categorically a conviction for an aggravated felony'] during any administrative proceedings before the IJ or the BIA' and that the court 'lack[ed] jurisdiction to adjudicate an issue where the petitioner failed to exhaust all administrative remedies as of right'" (citations omitted)). In his petition, Massis argues that at the time he conceded deportability, "the Maryland Court of Appeals made clear [in interpreting the state's reckless endangerment statute] that [a criminal] defendant's conduct need not involve the use or a substantial risk of the use of force," such that reckless endangerment might not constitute a "crime of violence" under 18 U.S.C. § 16(b). Petitioner's Br. at 20 (citing *Minor v. State*, 605 A.2d 138 (Md. 1992)). By conceding deportability, however, Massis declined to raise the issue of whether reckless endangerment constitutes a crime of violence before the IJ. Because Massis failed to exhaust his administrative remedies, this court has no jurisdiction to consider the substantive legal issue that he now raises.

Citing *Lara v. Trominski*, 216 F.3d 487, 493 (5th Cir. 2000), and other cases, Massis argues that "courts of appeals . . . may consider an alien's assertion that he was erroneously subject to deportation if the alien

demonstrates that his deportation would result in a gross miscarriage of justice." Petitioner's Br. at 39. Massis's reliance on a "miscarriage of justice" exception to the jurisdictional bar of 8 U.S.C. § 1252(d)(1) is similarly misplaced. In *Bowles*, the Supreme Court held that courts have "no authority to create equitable exceptions to jurisdictional requirements." 127 S. Ct. at 2366. The *Bowles* Court rejected the habeas petitioner's argument that the Court should excuse his untimely filing because he satisfied the "unique circumstances" doctrine of *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962). Emphasizing that "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement," the Court overruled *Harris Truck Lines* and a related case "to the extent they purport to authorize an exception to a jurisdictional rule." *Bowles*, 127 S. Ct. at 2637.

Since *Bowles*, courts of appeals have declined to entertain equitable exceptions to section 1252(d)'s administrative exhaustion requirement. Relying on *Bowles*, the Second Circuit held in *Grullon* that "there is no 'manifest injustice' exception to § 1252(d)'s exhaustion requirement" and that "[i]nsofar as our earlier opinions have held to the contrary, those opinions are overruled." *Grullon*, 509 F.3d at 115. The *Grullon* court reasoned that *Bowles*, in invalidating the "unique circumstances" exception, "likewise invalidates the 'manifest injustice' exception to the jurisdictional bar created by 8 U.S.C. § 1252(d)'s exhaustion requirement." *Id.* The Eight Circuit similarly relied on *Bowles* in declining to craft a futility exception to section 1252(d)(1)'s administrative exhaustion requirement. *See Bah v. Mukasey*, 521 F.3d 857, 859 (8th Cir. 2008) (citing *Bowles* for the proposition that courts have "no authority to create equitable exceptions to jurisdictional requirements"). Under *Bowles*,

Massis may not rely on a "miscarriage of justice" argument to revisit his concession of deportability and circumvent his failure to exhaust administrative remedies. Because we may not create an equitable exception to section 1252(d)(1)'s exhaustion requirement, this court lacks jurisdiction to consider whether reckless endangerment constitutes a crime of violence.

Massis's claim that he is not deportable as a convicted aggravated felon is dismissed for lack of jurisdiction.

[641] III.

For the foregoing reasons, Massis's three petitions for review are

DENIED IN PART AND DISMISSED IN PART.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A34 709 892—Baltimore

Date: JUL 26 2005

In re: NIMATALLAH SHAFIK MASSIS

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Rachel Z. Stutz, Esquire

ON BEHALF OF DHS: George W. Maugans, Chief Counsel

CHARGE:

Order: Sec. 241(a)(2)(A)(iii), I&N Dec. [8 U.S.C. § 1251(a)(2)(A)(iii)]—Convicted of an aggravated felony

APPLICATION: Reconsideration; reopening

The respondent moves this Board pursuant to 8 C.F.R. § 1003.2 to reopen and reconsider our decision dated February 25, 2005. Inasmuch as the respondent's motion to reconsider was filed more than 30 days after our decision, we find that it is untimely filed. 8 C.F.R. § 1003.2(b)(2). The respondent's motion to reopen, however, is timely filed because it was filed within 90

days of our prior decision. 8 C.F.R. § 1003.2(c)(2). The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) opposes the respondent's motion. The respondent's request for oral argument before this Board is denied. *See* 8 C.F.R. § 1003.2(h). The motion will be denied.

The respondent contends that his due process rights were violated by his prior counsel's ineffective assistance. In particular , he claims that his prior counsel, Father Mark Horak, should not have conceded that the respondent was deportable as charged. The respondent has not indicated when he became aware of the alleged ineffective assistance. However, the record indicates that the respondent was represented by Father Horak during proceedings before the Immigration Judge. On March 19, 2003, the Immigration Judge granted the respondent's application for relief under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). On April 7, 2004, another attorney filed an entry of appearance as the respondent's attorney of record before this Board. The respondent did not claim in his brief on appeal that his first attorney, Father Horak, provided him ineffective assistance or that he was not deportable as charged. The respondent instead chose to solely respond to the DHS's appeal of the grant of relief under former section 212(c) of the Act. The respondent has not claimed that he received ineffective assistance **[2]** of counsel from the attorney who represented him while his case was on appeal before this Board. The respondent is no longer represented by the counsel who represented him while his case was on appeal before this Board, and is currently represented by another attorney.

We are unable to find that the respondent filed his motion to reopen within a reasonable period of the al-

leged ineffective assistance. The respondent had an opportunity to file a motion to remand proceedings based on ineffective assistance while his case was on appeal, but failed to do so. Indeed, the respondent waited until almost 3 months after our February 25, 2005, decision to raise his ineffective assistance of counsel claim. He cannot now assert that his choice of pursuing relief under former section 212(c) relief constitutes ineffective assistance. *See generally Matter of B-B-*, 22 I&N Dec. 309 (BIA 1998) (finding that the aliens failed to show ineffective assistance of counsel where the alleged misconduct was related to the tactical advice by counsel). Based on the foregoing, we do not find that reopening is warranted. *See* 8 C.F.R. § 1003.2(a).

Accordingly, the following order will be entered.

ORDER: The motion to reconsider and reopen is denied.

/s/ [illegible]
FOR THE BOARD

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A34 709 892—Baltimore

Date: FEB 25 2005

In re: NIMATALLAH SHAFIK MASSIS

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Paromita Shah, Esquire

ON BEHALF OF DHS: Melody A. Brukiewa, Assistant Chief Counsel

CHARGE:

Order: Sec. 241(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1251(a)(2)(A)(iii)]—Convicted of aggravated felony

APPLICATION: Waiver of inadmissibility under section 212(c)

The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) has appealed an Immigration Judge's March 19, 2003, decision which granted the respondent, a Jor-

danian,[1] a waiver of inadmissibility under former section 212(c) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1182(c). The DHS contends that the Immigration Judge applied the incorrect standard as to whether the respondent is entitled to relief, and that the Immigration Judge's discretionary determination was wrong. The DHS's appeal will be sustained.[2]

The only issue before us on appeal is whether the respondent is entitled to a section 212(c) waiver in the exercise of discretion. We review the discretionary determination made by the Immigration Judge *de novo*. 8 C.F.R. § 1003.1(d)(ii). The exercise of discretion in a particular case necessarily requires consideration of all the facts and circumstances involved. There must be a balancing of the social and humane considerations presented in an alien's favor against the adverse factors evidencing his or her undesirability as a permanent resident. *See Matter of Edwards*, 20 I&N 191 (BIA 1990); *Matter of Buscemi*, 19 I&N Dec. 628, 633 (BIA 1988); *Matter of Marin*, 16 I&N Dec. 581, 585 (BIA 1978). As the negative factors grow more serious, it becomes incumbent upon the alien to introduce additional offsetting favorable evidence, which in some cases may have to **[2]** involve unusual or outstanding equities. *See Matter of Edwards, supra; Matter of Buscemi, supra; Matter of Marin, supra.*

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[1] The respondent was born in 1950 in Jerusalem, when the city was part of Jordan. Neither the findings concerning his nationality nor the designated country of deportation are at issue on appeal.

[2] This case was last before this Board on November 14, 2000, when we remanded the record for consideration of the merits of the respondent's request for relief.

"[W]hen an alien has a record of serious criminal activity, he must demonstrate 'unusual or outstanding equities' in order to be eligible for a favorable exercise of discretion under section 212(c)." *Gandarillas-Zambrana v. Board of Immigration Appeals*, 44 F.3d 1251, 1259 (4th Cir. 1995), *cert. denied*, 516 U.S. 806 (1995). Aliens who have committed violent or dangerous crimes are not to be granted discretionary relief except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which the alien clearly demonstrates that the denial of status adjustment would result in exceptional and extremely unusual hardship. *Matter of Jean*, 23 I&N Dec. 272 (A.G. 2002). Depending upon the gravity of the alien's underlying criminal offense, such a showing of exceptional and extremely unusual hardship might still be sufficient. *Id.*

Aside from the question of the requisite hardship, the facts surrounding the incident, and the respondent's failure to take responsibility for his actions, discussed below, are so serious that we will deny the waiver in the exercise of discretion.

The respondent was found deportable based on a 1995 Maryland conviction for reckless endangerment, after having chased his wife with an axe. He has not challenged his deportability on appeal, but for discretionary purposes, we will examine the facts surrounding the conviction. The respondent has recently denied the existence of his criminal conviction, even though he has expressed some sorrow for frightening his wife during the incident. He disputed the allegation that he was actually chasing his wife with an axe, but has insisted that he was merely trying to "return" the weapon to her. He denied the additional allegation—even though it is reflected throughout the record and in

the pertinent police report—that while wielding the axe he was "screaming" after her that he intended to kill her. *See* Exh. 3, tab I. Rather than accept responsibility for his crime, he suggested that his wife had somehow 'tricked' him. *See* Tr. at 79, 81, 98-106, 111. According to the police report, at least two eye witnesses to the crime agreed that the respondent would have killed his spouse had he not fallen down during the chase. Exh. 3, tab I. We note that his wife was walking with two preschool-age children at the time the respondent attacked her, and that he had already been under a court order to avoid contact with her.

During a March 1996 state court hearing, the respondent indicated that even with a divorce, he would always consider himself married to his wife. This was apparently his basis for repeatedly violating the court's order to avoid contact with his spouse and for continuing to proclaim his innocence. At that time, the state court judge said to the respondent, "You are about as innocent as a vampire. You are a vile man." Exh. 3 at 26, (March 1996, Maryland Circuit Court proceedings).

The Immigration Judge correctly noted that the respondent's 5-year prison sentence was initially suspended, but we observe that the respondent later was required to serve most of it. The reason the respondent's probation was revoked was because he continued to violate the state court order which forbade him to contact his wife. The respondent's lack of violence toward his former wife from the **[3]** mid-1990s to 2000 can be explained as he had been incarcerated by the state of Maryland and then by the DHS. Thus, there is little, if any, persuasive evidence of rehabilitation.

The respondent does have a severe mental disorder, variously diagnosed as bipolar disorder with psy-

chotic features, and as schizoaffective disorder, bipolar type. The respondent is considered delusional, having claimed to be the "son of God." The Immigration Judge's conclusion, that the respondent has an "inability" to accept responsibility for his actions, however, is not well supported, and there was no evidence of diminished capacity from the criminal trial records. *See also* Tr. at 98-103 (respondent's detailed recall of the pertinent events).

We acknowledge the Immigration Judge's concern that the respondent might become suicidal if deported. This outcome is speculative, however, in light of the psychiatrist's letters, and would partly hinge upon the supposed unavailability of psychiatric care in Jordan—a suggestion not supported by persuasive facts. *See* Tr. at 152-53. Although the social worker opined that suicide was a possibility, she seemed unfamiliar with the respondent's latest diagnosis. *Cf.* Tr. at 36. The respondent cannot prevent his own deportation by merely again suggesting that some time in the future he might harm himself. Conversely, we have considerable evidence that he was a danger to his former spouse in the United States.

Accordingly, we deny a section 212(c) waiver in the exercise of discretion, given the respondent's violent history about which he expresses little remorse. While we are sympathetic that the respondent has a serious mental disorder, that does not excuse his behavior. The respondent has not shown himself to be a desirable resident of the United States, nor has he demonstrated extraordinary circumstances that might warrant relief. *See Gandarillas-Zambrana v. Board of Immigration Appeals, supra; Matter of Edwards, supra; Matter of Buscemi, supra; Matter of Marin, supra.*

The following orders will be entered.

ORDER: The appeal of the Department of Homeland Security is sustained, and the Immigration Judge's March 19, 2003, decision is vacated.

FURTHER ORDER: The respondent is ordered deported to Jordan.

/s/ [illegible]
FOR THE BOARD

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BALTIMORE, MARYLAND

IN THE MATTER OF

MASSIS, Nimatallah Shafik,

RESPONDENT

IN DEPORTATION PROCEEDINGS

Case # A34-709-892

CHARGES: Former Section 241(a)(2)(A)(iii)[1] of the Immigration and Nationality Act (INA), as one convicted of an aggravated felony as defined in INA § 101(a)(43), a crime of violence for which the term of imprisonment was five years or more.

APPLICATION: INA § 212(c), Waiver of Inadmissability (deportation).

ON BEHALF OF RESPONDENT
Muriel Van Den Burg

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[1] This section is now renumbered as INA § 237(a)(2)(A)(iii) (2002).

Catholic Charities
Immigration Legal Services
430 South Broadway Street
Baltimore, Maryland 21231-2409

ON BEHALF OF INS
Melody A. Brukiewa, Esq.
Assistant District Counsel
Immigration and Naturalization Service
31 Hopkins Plaza, 7th Floor
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MEMORANDUM OF DECISION AND ORDER

Procedural History

Respondent is a fifty-two year old male, native and citizen of Jordan, who was admitted to the United States as a lawful permanent resident on November 20, 1974. On August 16, 1995, in the Circuit Court for Montgomery County, Maryland, Respondent was convicted pursuant to a guilty plea for the offense of reckless endangerment, in violation of Article 27, Section 120 of the Annotated Code of **[2]** Maryland.[2] Respondent was sentenced to five years imprisonment, suspended, and two years of supervised probation. On June 28, 1996, the Immigration and Naturalization Service (INS) filed an Order to Show Cause (OSC) with the Court. The OSC charged Respondent with deportability pursuant to section 241(a)(2)(A)(iii) of the Immigration and Nationality Act (INA), now renumbered as

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[2] Respondent was also charged with criminal contempt for violating a restraining order, to which Respondent pled guilty on the same date.

INA § 237(a)(2)(A)(iii), as one convicted of an aggravated felony as defined in INA § 101(a)(43), a crime of violence for which the term of imprisonment imposed was five years or more. Respondent conceded deportability. Respondent now seeks relief under former INA § 212(c).

Statement of Law and Findings of the Court

A. Availability of INA § 212(c) Relief

Under *INS v. St. Cyr*, 533 U.S. 239, 121 S. Ct. 2271, 2293 (2001), relief under former INA § 212(c) remains available for aliens whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect.

Under former INA § 212(c), if a convicted alien demonstrated that he had a lawful unrelinquished domicile in the United States of at least seven years and that his conviction was not for an aggravated felony, for which he had *served* a term of imprisonment of five years or longer, the Attorney General could, in her discretion, waive deportation. *See* 8 U.S.C. § 1182(c) (1994) (repealed by IIRIRA § 304(b), Pub. L. No. 104-208, Sept. 30, 1996); *see, e.g.*, *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976) (holding that § 212(c) relief extends to aliens not actually departed from the United States); *Matter of Silva*, 16 I&N Dec. 26 (BIA 1976) (extending § 212(c) relief to aliens in deportation proceedings). A lawful permanent resident is *prima facie* eligible for relief from deportation under § 212(c), even though he has not proceeded abroad subsequent to the acts that rendered him deportable. *Matter of Edwards*, 20 I&N Dec. 191 (BIA 1990).

In this case, Respondent has lived in the United States as a lawful permanent resident since 1974. Respondent pled guilty in 1995 to reckless endangerment. Respondent was sentenced to five years imprisonment. However, Respondent's sentence was suspended, he was placed on probation, and he did not ultimately *serve* five years in prison. At the time Respondent pled guilty to the charge, the conviction rendered him deportable under the immigration laws. *See* INA § 241(a)(2)(A)(iii), now renumbered as INA § 237(a)(2)(A)(iii). When Respondent pled guilty to this crime in 1995, he was *prima facie* eligible to apply for a waiver of deportation under former INA § 212(c); under the Supreme Court's holding in *St. Cyr*, such relief remains available to him.

B. Respondent's Application for a Waiver of Deportability Pursuant to INA § 212(c).

[3] Section 212(c) of the Act does not provide an indiscriminate waiver for all who demonstrate statutory eligibility for such relief. Instead, the Court is required to determine as a matter of discretion whether an applicant merits the relief sought, and he bears the burden of demonstrating that his application merits favorable consideration. *See Matter of Edwards*, 20 I&N Dec. 191 (BIA 1990); *Matter of Marin*, 16 I&N Dec. 581, 582-83 (BIA 1978).

The Board of Immigration Appeals, (the Board), has established guidelines for determining whether an alien warrants INA § 212(c) relief as a matter of administrative discretion. *Matter of Edwards*, 20 I&N Dec. 191 (BIA 1990); *Matter of Buscemi*, 19 I & N Dec. 628 (BIA 1988); *Matter of Marin*. Discretionary relief under § 212(c) requires that there be a balancing of the *adverse* factors evidencing a respondent's undesirabil-

ity as a permanent resident with the *social* and *humane* considerations presented on the respondent's behalf, to determine whether the granting of the respondent's application appears to be in the best interest of the community of the United States. *See Matter of Marin.*

Favorable considerations include, but are not limited to the following: family ties within the United States, residence of long duration in the United States, evidence of hardship to the respondent and his or her family if deportation occurs, service in the United States armed forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to the respondent's good character. *Id.*

The Board has also identified factors deemed adverse to an alien's application for § 212(c) relief, including: the seriousness of the offense, the nature and underlying circumstances of the grounds of exclusion, the presence of significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature, recency, and seriousness, and the presence of other evidence indicative of an individual's bad character and undesirability. *See Matter of Edwards*, Int. Dec. 3134 (BIA 1990); *Matter of Buscemi*; *Matter of Marin.*

The respondent has demonstrated prima facie eligibility for INA § 212(c) relief insofar as he has established that he has had unreliquished domicile in the United States of more than seven years. The record and the testimony establish that Respondent entered the United States as a lawful permanent resident in 1974. As discussed above, Respondent's conviction for

an aggravated felony was not one for which he *served* a term of imprisonment of five years. Accordingly, this case hinges on whether, considering the particular facts presented, relief is warranted in the exercise of discretion.

The Court has considered all of the facts and arguments presented by the parties.

Testimony of the Respondent

The respondent testified that he has been present in the United States since 1974, with only one departure. He explained that he last worked 20 years ago and has, since then, been receiving payments [4] because he is disabled. He testified that he owns the house in which he lives.

He described his family ties in the United States and abroad. He lives approximately eight minutes away from his ex-wife, Hilda. He has almost daily contact with his daughter Ellen, who lives with her mother. An older daughter serves in the United States Army. One son is deceased. Two sons live with him. He said that all of his children were born in the United States. The respondent also testified about his sister Rita, who lives five minutes away, and a brother, Raymond, who lives in Virginia. The respondent testified that he cannot live without his family. He testified about close relationships with his children and with his sister. Regarding family ties outside of the United States, the respondent said that he has four brothers and one sister in Palestine and Israel, with whom he occasionally has telephone contact. He said that he last saw them in 1983.

Regarding contact that he currently has with Mrs. Massis, he explained that she had recently called him to take her shopping, because she does not drive.

The respondent testified that he has had one problem with the police. It was in 1993. He said that police officers hit him in the head and that he sustained an injury which required 7 stitches. He explained that the police told him that his wife had obtained an ex-parte order, of which he was unaware. When asked if he had ever had trouble with the police in 1995, the respondent recounted an incident in which he wanted to, "give [Hilda Massis] the axe." He explained that he saw his wife walking with two little girls. He expressed his concern to her that they could both lose their houses if anything happened to the children, whereupon, according to the respondent, Hilda Massis told him that it was not his business and commenced to curse at him. According to the respondent, she then began to scream and say that the respondent was trying to hurt her. The respondent states that he is sorry about the incident and declared that his intention was not to hurt Mrs. Massis. The respondent testified about how he came to be in possession of the axe: his wife had given it to him three days before. According to the respondent, Mrs. Massis had also given him a knife, because he had "caught" a deer. However, according to the respondent, after giving him these items, Mrs. Massis "made a trick." When he tried to return to axe to her, she told the police that he had tried to hit her.

Regarding documents in the record which describe his criminal conduct in the United States, the respondent explained that he cannot read or write English. He denied the substance of certain information contained in a police report at Exhibit 3. He stated that he could not remember if he placed the axe in a closet after

his confrontation with Mrs. Massis. He stated that he did recall that he handed over the axe to the police. He denied that he had threatened to kill Mrs. Massis during the incident. He stated his perception that Mrs. Massis wants to ruin his career. Regarding information in the record relating to his history of violent treatment of Mrs. Massis, the respondent testified that, "Hilda lies . . . ." He explained that he has forgiven her for a lot of things. Mr. Massis denied that he has ever hit Mrs. Massis or that his treatment of her ever led her to seek treatment at a hospital. The most Mr. Massis conceded was that he has pushed her. He blamed her family members for interfering with his relationship with Mrs. Massis and for encouraging her to pursue divorce.

[5] The respondent testified that he has had no other problem with the police. The respondent testified that he considers himself to be a "peacemaker."

The respondent testified about his desire to stay in the United States and about his perception that he has nobody in Palestine and would have no place to go. He explained that his children are the most important people in his life. He testified that a judge told him to stay away from his ex-wife, and that he intends to obey that order. He testified about his regular contact with people in the community who assist him with his mental health and identified a witness who was present in the courtroom as being his social worker. He explained that he is on medications which he takes to help him and he explained his intention to continue to take his medications and to meet with mental health professionals and social workers.

The respondent testified that he remembers when a judge instructed him, in 1994, not to contact Mrs.

Massis. The respondent testified that he contacted her anyway because of the children.

Testimony of the Clinical Social Worker

The respondent called as his first witness Ms. Dunsmore, a licensed clinical social worker with Community Connections, a community-based mental health resource located in Rockville, Maryland. She testified about her qualifications and about her employment history. She explained that she met the respondent in June 2000, in Baltimore, while he was in detention, and that she did so at the request of Catholic Charities. The witness testified about the professional relationship she has with the respondent and about how she assisted him upon his release from custody. She testified about the respondent's "biweekly case management" which includes visits to the respondent's home and visits by the respondent to his psychiatrist. The witness also testified about assistance she provides the respondent with his medication. The witness testified that while the respondent has been re-assigned to a different social worker, she still meets with him in counseling sessions once or twice a month. She described both group and individual therapy that the respondent has participated in, or is participating in. The witness testified about her contacts with the respondent's psychiatrist.

Ms. Dunsmore testified about her knowledge that the respondent has declared himself to be "the son of God." She testified about her knowledge that in the summer of 2000, the respondent had been diagnosed with a delusional disorder. She said that, at the time, the respondent was also sad over the death of one of his sons. She explained that the respondent's current diagnosis is "bi-polar disorder with psychotic features."

She said that as a result of his illness, he suffers from bizarre delusions. She acknowledged, on cross-examination, that the respondent has also been diagnosed with "schizo-affective disorder," an ailment that she said she inaccurately had characterized during her initial testimony as being a *possible* diagnosis. She testified about the various medications that the respondent takes, how he receives them and how they are paid for. She testified about her certainty that he actually takes his prescribed medications.

[6] Ms. Dunsmore testified that the respondent is cooperative and keeps his appointments. Regarding his affect, she testified that she has not noticed much of a change: he remains delusional and continues to express sorrow over the death of his son and over the break up of his family. She noted that one change is that he is no longer always crying or on the verge of tears.

Ms. Dunsmore testified that she was at the respondent's home on the Monday preceding the hearing. She made another home visit a month before. She characterized his home as being tidy. She described the assistance that his brother provided in making repairs to the home and assistance that the respondent received from his brother in paying for repairs. She testified that, as of the time of the hearing, the respondent had been living independently for over a year. She said that he drives himself to his appointments. She testified about how her organization assists the respondent by using the respondent's income to pay his household bills. She emphasized that she has never seen the respondent behave in a violent or threatening way and that she is not fearful of going to visit him in his home by herself. She testified that based on his behavior over the past 1 1/2 years, she does not view him as being a threat to the community. She stated her opinion that in the time she

has known him, she has seen no evidence that would reflect that he would revert to violence. She said that she has spoken to the respondent about his crime and that he doesn't remember it because he is psychotic. She also noted that his memory of it could be affected by the fact that it was such a traumatic event. She testified that he has memories of being incarcerated, something that he has difficulty comprehending. She said that he is slowly beginning to comprehend certain rules, e.g., that he cannot park on the street in front of his wife's house. She said that she has never heard him threaten his wife or speak of doing her any harm. She said that he is a man who loves his children and his "wife" and who just wants everyone to be happy. She testified about her knowledge that his fifteen-year old daughter Ellen spends weekends with the respondent and surmised that her mother must trust the respondent. She testified about the impact that the respondent's behavior has had on his children: it deprived them of security and of income and of "many things."

The witness opined that without adequate intervention, the respondent's mental health would severely decline and could result in suicide. Regarding his prognosis, Ms. Dunsmore stated that he should "manage well" as long as he has psychiatric care and assistance in the community. She said that she does not know that his condition will ever change because there is no cure for it. She indicated that her organization will continue to treat the respondent and that he has expressed that he wants to continue with treatment.

On cross-examination, the witness testified that she had had little interaction with the respondent's children and no interaction with his ex-wife. She stated that information regarding the respondent's history comes from his sister Rita. She indicated that she had

learned from his sister that even as a child, the respondent was "a little different" and that he had had no psychiatric treatment prior to the year 2000.

Testimony of Rita Zarou

Mrs. Zarou testified that the respondent is her brother. She said that she lives in Rockville, [7] Maryland, 1 1/2 miles away from the respondent. She testified that the respondent visits her at her home twice a week. She observed that since he has begun seeing a psychiatrist and taking medication, he is "quiet" and not so nervous. She named two people from Community Connections, Marlene and Laura, who help the respondent. Mrs. Zarou testified that the respondent's problems have been painful for the whole family. She testified about the birth of all of her siblings in Israel and explained that there is no help for the respondent "over there." She said that because there are no medicines, because the respondent has no education, and because their brother who resides in their homeland is poor, the respondent, were he to return, would be "crazy in the street." She said that she petitioned for the respondent and that he came to the United States when he was 25 years old. She said that he and Mrs. Massis had been married for one or two weeks before he emigrated to the United States.

Mrs. Zarou testified about how the respondent's family depends on him. She said that the respondent's ex-wife uses bus transportation to get to work. However, is she is late, according the the witness, Mrs. Massis calls the respondent so that he can drive her. Mrs. Zarou also stated that the respondent's daughter Ellen does not drive, and if she needs transportation, she calls her father.

Regarding the incident which led to the respondent's 1995 conviction, Mrs. Zarou testified that she had spoken to both the respondent and to Mrs. Massis about it. According to the witness, the respondent told her that he was not trying to hurt Mrs. Massis, only attempting to give her the axe. According to Mrs. Zarou, Mrs. Massis said that she had to run into someone's house during the incident.

Testimony of Ellen Massis

The respondent's daughter, Ellen Massis, testified that she is fifteen and enrolled in the Ninth Grade in Wheaton and lives with her mother, Hilda Massis. She said that she stopped living with her father when her parents divorced in 1996. She testified that she sees her father every day and that he takes her places. According to Ms. Massis, the respondent "goes to her house" or she visits him at his, where she spends the night, eats, watches t.v. and talks to him. She said that her mother is aware that she visits the respondent and believes that it is good. Ms. Massis noted that the respondent was in jail for half of her life and that she needs to get to know him. She explained that she is not required to visit him and that she chooses to do so because she loves him. Ms. Massis testified that before he was on medication, her father was "hyper," but that now he is "good." He doesn't hit when he takes the medication and he is calmer and friendlier. According to Ms. Massis, she has never seen her father take his medication but both he and her mother have told her that he does.

Ms. Massis testified about what she knows of her father's past history: he tried to kill her mother with an axe. She testified that her older brothers told her that her father used to hit her mother, something that

she does not have an independent recollection of. Nor does she remember the incident which led to her father's conviction and prison term. She stated that she has seen her brothers and her father push her mother. She said that this does not really affect her now because she was small and those things happened so long ago. According to Ms. Massis, she is very close to the respondent and would feel "bad and sad" [8] if she couldn't see him anymore. She explained that what he did before was in the past and that he now gets along with her mom. She remembers that he once hit her because she said a "cuss" word. She said that she used to be afraid of him because of the attack with the axe and used to worry that he might kill her. She testified that her mother was afraid a lot of times, but that her mother has said she is not afraid of the respondent. According to Ms. Massis, her mother made the statement about not being afraid of the respondent the first week he came out of jail. According to the witness, her parents talk once a day. Either the respondent calls to speak to the witness, or her mother calls the respondent's house to speak to her sons. She said that both she and her mother invite the respondent into the house for coffee. The witness said that she observes that her parents do not scream or fight. According to the witness, the respondent was at her mother's house on the day before the hearing, watching videos and drinking coffee. Ms. Massis said that her mother is aware that she has to be a witness in her father's case. She said that her mother instructed her to tell the truth. She testified that her mother would be sad if the respondent left the United States because then, her children would not have a father.

Ms. Massis testified that her two brothers moved into the respondent's house in December of 2001 be-

cause they argued with their mother. She said that she does not know why she lives with her mother and that she was six or seven when her parents last lived together. She said that she remembers that her father used to paint for a living. She also testified that he does not pay child support. She said that her mother works at a department store. Regarding her father's ties to the community, the respondent testified that he goes to an Arabic-speaking church, goes shopping or goes to visit his sister.

Documents

Documents in the record include transcripts from the hearing in which the respondent was found to be in contempt of a court order to stay away from his wife; letters from the respondent's psychiatrist; a letter from the respondent's oldest daughter; medical reports, police reports and photos depicting and referencing the abuse of Mrs. Massis by the respondent; a certificate evidencing participation in group counseling at Community Connections; conviction and other court records, including a victim impact statement from Mrs. Massis dated August 7, 1995.

Analysis and Conclusion

The seriousness of the Respondent's misconduct cannot be understated. He has a history of battering his wife and convictions which are related to his abuse and inability or unwillingness to conform to acceptable standards of conduct. Considered in conjunction with this bad conduct, however, are certain social and humane considerations. The Respondent suffers from mental illness. He has been diagnosed with Schizo-Affective Disorder, Bipolar type. (See R. Ex. S, Ex. V). Respondent has lived in the United States for twenty-

seven years. He has strong family ties in the United States, including his four surviving children, two of whom live with him. Respondent owns his own home in the United States.

The INS has well highlighted the respondent's bad conduct in the United States. The record **[9]** supports to a large degree the conduct noted by the INS, the pivotal event being the respondent's violent confrontation with his wife, while wielding an axe. The INS has emphasized the lack of rehabilitation in the case as being an important factor which should contribute to a denial of the application for relief. The Court would note, as the INS has argued, that the respondent has not admitted to his crimes.

In general, while he was on the witness stand, the respondent displayed an inappropriate and peculiar demeanor, which at times involved a certain lack of responsiveness to questions put to him. However, from the testimony of the respondent's witness, Ms. Dunsmore, and from the letters of the psychiatrist, the court accepts the conclusion of the experts that the respondent's failure to own up to his criminal conduct, or more accurately stated, his *inability* to own up to his conduct, is a direct result of his mental illness. The Court also concludes that the manner in which he presented himself at the hearing is a reflection of his mental illness and not of any deliberate attempt to evade questions or display contumelious conduct in a court proceeding.

While it is true that the respondent has violated court orders in the past, there is no evidence that the respondent has, since his last conviction, failed to comply with the terms of any court order. The record further reflects that the respondent is in compliance with

directives from psychiatric personnel and social workers who assist him in managing his chronic mental illness. For example, there is evidence that he receives active treatment for his illness, with frequent monitoring, and that he attends and participates in therapy and home-monitoring, resources that were not available to him prior to his incarceration.

There is no evidence to show that, since his conviction for contempt, the respondent has initiated any unwanted contact with his ex-wife. In fact, credible witness testimony established that Mrs. Massis no longer fears the respondent and, in fact, calls him to request rides to work, invites him into her home for refreshments, and allows her teenaged daughter to spend unsupervised weekends with the respondent in his home. The Court declines to draw an inference from Mrs. Massis' absence from the hearing that she is still so fearful of the respondent that she could not present herself as a witness. First, there is no affidavit to this effect from Mrs. Massis. Second, the Court would note that Mrs. Massis was present at the hearing held in the Circuit Court for Montgomery County, Maryland on October 20, 1995 in which Mr. Massis was found to be in violation of his probation. *See* Ex. 3, tab C. It is illogical, barring any additional evidence to the contrary, that Mrs. Massis would be any more fearful today of Mr. Massis than she was in 1995, a time much closure in proximity to his attack with the axe. Furthermore, such an inference is contradicted by witness testimony which established that Mrs. Massis has expressed that she is no longer afraid of the respondent.

Thus, while the respondent was unable to clearly articulate remorse over his past bad conduct, his actual behavior since his incarceration is strongly indicative of rehabilitation. In any event, the law does not require

the demonstration of rehabilitation in every case. *Matter of Buscemi*, at 196. Rather, applications must be evaluated on a case-by-case basis, with rehabilitation but one factor to be considered in the exercise of discretion. *Matter of Edwards*, supra.

[10] This is a difficult case, in light of Respondent's serious misconduct. Discretion frequently requires difficult decisions on close facts. It would be unconscionable to "discard" Respondent, who has been so troublesome because of his mental illness, by jettisoning him into a violent region of the world where he will have inadequate support for his mental illness and where he, very likely, will face homelessness and even statelessness. Tipping the balance in the respondent's favor, in addition to evidence that he has been able, of late, to conform to acceptable behavioral norms, is the evidence that he is not perceived by health care professionals to be dangerous and evidence that his former wife is not afraid. It would be easy to solve the problem created by Respondent's presence in the United States by signing an order for his expulsion. It would also be irresponsible.

The Court finds that, on balance, the equitable factors in this case outweigh the adverse factors. Accordingly, the Court will grant Respondent's application for relief. An appropriate order is attached.

March 19, 2003
Date

/s/ Lisa Dornell
Lisa Dornell
United States Immigration Judge
Baltimore, Maryland

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BALTIMORE, MARYLAND

IN THE MATTER OF

MASSIS, Nimatallah Shafik,

RESPONDENT

IN DEPORTATION PROCEEDINGS

Case # A34-709-892

APPLICATION: INA § 212(c), Waiver of Inadmissability (deportation).

ON BEHALF OF RESPONDENT
Muriel Van Den Burg
Catholic Charities
Immigration Legal Services
430 South Broadway Street
Baltimore, Maryland 21231-2409

ON BEHALF OF INS
Melody A. Brukiewa, Esq.
Assistant District Counsel
Immigration and Naturalization Service
31 Hopkins Plaza, 7th Floor
Baltimore, Maryland 21201

ORDER

It is thus ORDERED, this 19th day of March 2003, by the United States Immigration Court, sitting at Baltimore, Maryland,

that Respondent's application for a Waiver of Inadmissibility (deportation) pursuant to former § 212(c) of the Act is GRANTED, with the expectation that he:

1. continue to pursue treatment of his mental illness;
2. avoid any unwanted contact with his ex-wife;
3. obey all laws.

3/19/03
Date

/s/ Lisa Dornell
Lisa Dornell
United States Immigration Judge
Baltimore, Maryland

APPENDIX E

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
103 S. GAY STREET, RM. 702
BALTIMORE, MD 21202

In the Matter of:
*S—MASSIS, NIMATALLAH SHAFIK
RESPONDENT

Case No.: A34-709-892

IN DEPORTATION PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on Dec 31, 1998. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed, the Oral Decision will become the official decision in this matter.

(√) The respondent was ordered deported to JORDAN, or in the alternative to ~~~~~

* * *

Date: Dec 31, 1998

/s/ Lisa Dornell
LISA DORNELL
Immigration Judge

Appeal: RESERVED (Alien/INS/Both)
Appeal Due by: Feb 1, 1998
KJC

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)

TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [x] ALIEN'S ATT/REP [x] INS

DATE: 12/8/98 BY: COURT STAFF VCM

Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Baltimore, Maryland

File A 34 709 892 December 31, 1998

In the Matter of

NIMATALLAH SHAFIK MASSIS,	)	IN
	)	DEPORTATION
Respondent	)	PROCEEDINGS

CHARGE:

APPLICATION:

ON BEHALF OF RESPONDENT:

Mark Horak, Esquire

ON BEHALF OF SERVICE:

John T. Thompson, Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent, having admitted and conceded the charges and allegations in the Order to Show Cause, and there being no apparent relief from deportability available to the respondent, he shall be deported from the United States to Jordan based on the one charge in the Order to Show Cause.

LISA DORNELL
Immigration Judge
DEC 12 2003

143 (2) OCT 22

No. 08-1392

In the Supreme Court of the United States

NIMATALLAH SHAFFIK MASSIS, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an alien who conceded before an immigration judge that he is deportable as an aggravated felon and then presented no challenge regarding deportability during an appeal to the Board of Immigration Appeals failed to exhaust administrative remedies, as required by 8 U.S.C. 1252(d)(1), thus precluding judicial review of his claim of non-deportability.

2. Whether the Fifth Amendment affords an alien a right to relief based on the ineffective assistance of privately retained counsel during immigration proceedings.

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In the Supreme Court of the United States

No. 08-1392

NIMATALLAH SHAFFIK MASSIS, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 549 F.3d 631. The decisions of the Board of Immigration Appeals (Pet. App. 21a-23a, 25a-30a) and the immigration judge (Pet. App. 31a-50a, 51a-52a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 2008. On February 23, 2009, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 8, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien who has been convicted of an aggravated felony is subject to removal from the United States. 8 U.S.C. 1227(a)(2)(A)(iii). As relevant here, the term "aggravated felony" is defined as including "a crime of violence (as defined in section 16 of Title 18 * * *) for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(F) (footnote omitted).

In a removal proceeding conducted by an immigration judge (IJ), an alien may apply for any relief from removal for which he considers himself eligible. 8 C.F.R. 1240.1, 1240.11. After a hearing, the IJ issues either an oral or written decision on the alien's removability and eligibility for relief from removal. 8 U.S.C. 1229a(c)(1)(A); 8 C.F.R. 1240.12(a). If the IJ enters an order of removal, the statute requires the IJ to "inform the alien of the right to appeal that decision and of the consequences for failure to depart under the order of removal, including civil and criminal penalties." 8 U.S.C. 1229a(c)(5).

b. The Board of Immigration Appeals (Board) hears appeals from decisions of IJs. 8 C.F.R. 1003.1(b), 1240.15. Regulations direct that an appeal from an immigration judge's decision shall be taken by filing a notice of appeal directly with the Board within 30 calendar days after the date of the decision. 8 C.F.R. 1003.3(a)(1), 1003.38(b). "Briefs in support of or in opposition to an appeal from a decision of an [IJ] shall be filed directly with the Board." 8 C.F.R. 1003.3(c)(1). The Board's practice manual contemplates the possibility of cross-appeals. See Board of Immigration Appeals, Dep't of Justice, *Practice Manual* Ch. 4.7(a)(i) (2004)

<http://www.usdoj.gov/eoir/vll/qapracmanual/apptmtn4.htm>. Regulations, however, specifically provide that an appeal based on a fact or conclusion of law conceded at the removal hearing can be summarily dismissed. See 8 C.F.R. 1003.1(d)(2)(B); see also *In re Roman*, 19 I. & N. Dec. 855, 856 (B.I.A. 1988) (construing earlier version of same regulation and finding that having "conceded her deportability at the deportation hearing," the alien "cannot contest her deportability on appeal"); *In re In Ku Kim*, No. A047-413-659, 2009 WL 2370858 (B.I.A. July 22, 2009) ("As the respondent conceded his removability at his hearing before the [IJ], he cannot contest his removability on appeal.").

The Board may reopen any proceedings in which it has previously entered a decision. 8 U.S.C. 1229a(c)(7). As a general matter, an alien may file only one motion to reopen, and it must be filed within 90 days after the entry of a final order of removal. 8 U.S.C. 1229a(c)(7)(A) and (C)(i); 8 C.F.R. 1003.2(c)(2). A motion to reopen proceedings must state the new facts that will be proved at a hearing if the motion is granted and be supported by affidavits or other evidentiary material. 8 C.F.R. 1003.2(c)(1). "A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." *Ibid.* The Board has broad discretion in adjudicating a motion to reopen, and it may "deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. 1003.2(a); see *INS* v. *Abudu*, 485 U.S. 94, 110 (1988) (analogizing a motion to reopen to "a motion for a new trial in a criminal case on the basis of newly discovered evidence, as to

which courts have uniformly held that the moving party bears a heavy burden").

c. The INA also includes a detailed framework for judicial review of final orders of removal. A court "may review a final order of removal only if—(1) the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. 1252(d). As originally enacted in 1996, Section 1252 barred court of appeals jurisdiction to review removal orders entered against certain classes of criminal aliens, including those convicted of an aggravated felony. 8 U.S.C. 1252(a)(2)(C) (2000). As a result, many criminal aliens filed petitions for habeas corpus in federal district courts. Congress, however, eliminated habeas corpus review of final orders of removal in Section 106(a) of the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Tit. I, 119 Stat. 310. Now, the sole means of obtaining judicial review of a final order of removal is through a petition for review in a court of appeals. 8 U.S.C. 1252(a)(5). An alien whose criminal conviction previously operated to preclude judicial review of an order of removal may now obtain "review of constitutional claims or questions of law" by means of a petition for review. 8 U.S.C. 1252(a)(2)(D).

2. a. Petitioner, a native and citizen of Jordan, was admitted to the United States in November 1974 as a lawful permanent resident. Pet. App. 3a. On February 3, 1995, petitioner was arrested for chasing his wife and two preschool-age girls with an ax through a residential neighborhood. *Id.* at 4a, 28a. At the time, petitioner was under a court order to avoid contact with his wife and had repeatedly violated that order. *Ibid.* On March 3, 1995, petitioner was charged under Maryland law with intent to murder, carrying a weapon openly with intent to injure, criminal contempt, and reckless endanger-

ment. *Ibid.* On June 6, 1995, petitioner pleaded guilty to one count of reckless endangerment and one count of criminal contempt, and was sentenced to a five-year term of imprisonment. *Id.* at 4a.

b. On June 28, 1996, the former Immigration and Naturalization Service (INS)[1] initiated proceedings against petitioner, alleging that he was deportable under 8 U.S.C. 1227(a)(2)(A)(iii) for having been convicted of an aggravated felony, as defined in 8 U.S.C. 1101(a)(43)(F) (1994) to include a "crime of violence * * * for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least 5 years."[2] Pet. App. 4a-5a.

On December 31, 1998, petitioner appeared with counsel before an IJ, conceded that he was deportable as an aggravated felon, and sought a discretionary waiver of deportation under former Section 212(c) of the INA, 8 U.S.C. 1182(c) (1994) (repealed 1996).[3] Pet. App. 5a.

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[1] On March 1, 2003, the INS was abolished and many of its functions were transferred to the Department of Homeland Security (DHS). See 6 U.S.C. 251, 271(b), 291.

[2] Later in 1996, Congress reduced the length of the triggering sentence under Section 1101(a)(43)(F) and otherwise amended the provision's phrasing. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, Subtit. B, §§ 321(a), 322(a)(2)(A), 110 Stat. 3009-627, 3009-629. The definition now refers to "a crime of violence * * * for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(F) (footnote omitted). "Notwithstanding any other provision of law," the amended definition "applies regardless of whether the conviction was entered before, on, or after [the date of amendment]." 8 U.S.C. 1101(a)(43) (final sentence).

[3] Section 212(c) authorized some permanent resident aliens domiciled in the United States for seven consecutive years to apply for discretionary relief from exclusion, and was generally construed as being applicable in both deportation and exclusion proceedings. See *INS* v.

The IJ concluded that petitioner was deportable, but ultimately granted petitioner's application for discretionary relief under Section 212(c) on March 19, 2003. *Id.* at 5a, 31a-50a.

c. DHS appealed the IJ's decision to the Board. Pet. App. 6a.; Admin. R. 40-60, 77-80 (A.R.). Petitioner, represented by new counsel, filed a brief in which he argued that the IJ's grant of a Section 212(c) waiver was correct. Pet. App. 6a; A.R. 10-36.

On February 25, 2005, the Board vacated the grant of Section 212(c) relief. Pet. App. 25a-30a. The Board explained that "the facts surrounding" petitioner's attack on his wife, and his "failure to take responsibility for his actions," were "so serious" that they justified denial of any discretionary waiver. *Id.* at 27a. After discussing the facts of petitioner's crime—including evidence that he "would have killed his [wife] had he not fallen down during the chase"—his mental illness, and the prospects for psychiatric treatment, the Board concluded that petitioner "has not shown himself to be a desirable resident of the United States, nor has he demonstrated extraordinary circumstances that might warrant relief." *Id.* at 27a-29a.

d. On March 25, 2005, petitioner, through his second counsel, filed a petition for review with the United States Court of Appeals for the Fourth Circuit, seeking

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St. Cyr, 533 U.S. 289, 295 (2001). In 1996, Congress repealed Section 212(c) and replaced it with a form of discretionary relief that is not available to a criminal alien who has been convicted of an aggravated felony, *id.* at 297, but this Court held in *St. Cyr* that the repeal of Section 212(c) should not be construed to apply to an alien convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for relief under Section 212(c), *id.* at 314-326.

review of the Board's February 25, 2005 denial of his application for a Section 212(c) waiver. Pet. App. 6a.

3. a. On May 5, 2005, petitioner, after retaining a third counsel, filed a petition for a writ of habeas corpus in the United States District Court for the District of Maryland, seeking "declaratory and injunctive relief to enjoin his imminent removal from the United States." Pet. App. 6a-7a. On June 27, 2005, the district court transferred the habeas petition to the court of appeals pursuant to the REAL ID Act. *Id.* at 7a.

b. On May 25, 2005, petitioner, through his third counsel, filed a motion to reconsider and reopen with the Board, asserting a claim of ineffective assistance by his first counsel, based upon that counsel's concession of petitioner's deportability in December 1998. Pet. App. 7a; see Supp. A.R. 81-98. Petitioner also argued for the first time that his Maryland conviction for reckless endangerment did not constitute a "crime of violence" and thus should not have subjected him to removal proceedings. Pet. App. 7a; see Supp. A.R. 81-98.

On July 26, 2005, the Board denied petitioner's motion to reconsider and reopen. Pet. App. 21a-23a. The Board denied the motion to the extent petitioner requested reconsideration because the request was untimely filed. *Id.* at 21a. The Board denied petitioner's motion to reopen because he had not "file[d] his motion to reopen within a reasonable period of the alleged ineffective assistance." *Id.* at 22a-23a. The Board noted that petitioner had retained new counsel in April 2004 (against whom he did not assert any claim of ineffective assistance) and could have filed a "motion to remand proceedings based on ineffective assistance" of counsel at any time while his case was on appeal to the Board, but he had instead waited to raise his ineffective-assis-

tance claim "until almost 3 months after [the Board's] February 25, 2005 decision" denying his request for Section 212(c) relief. *Id.* at 23a.

c. On August 19, 2005, petitioner filed a petition for review with the court of appeals seeking review of the Board's July 26, 2005 denial of his motion to reconsider and reopen. Pet. App. 8a.

4. The court of appeals consolidated the two petitions for review (of the Board's February 2005 and July 2005 decisions) and the habeas petition that had been transferred from district court. Pet. App. 8a. On December 9, 2008, the court of appeals denied or dismissed all three petitions. *Id.* at 1a-20a.

a. The court of appeals affirmed the Board's July 2005 decision denying petitioner's motion to reopen. Pet. App. 10a-14a. First, as to the argument that his first counsel's concession of deportability at his 1998 immigration hearing was plainly ineffective, the court concluded that the Board did not abuse its discretion in rejecting that argument because the state of the law at the time of petitioner's hearing supported the Board's determination. *Id.* at 11a-12a. The court further concluded that petitioner's first counsel's concession was understandable given counsel's decision to seek a discretionary waiver under former Section 212(c), which the IJ granted. *Id.* at 13a. Thus, the court concluded that petitioner had not shown that the Board abused its discretion in refusing to allow him to "revisit" his concession of deportability by asserting an ineffective assistance of counsel claim. *Ibid.* Second, the court concluded that petitioner failed to show that the Board abused its discretion in denying his motion to reopen and reconsider because the Board noted that petitioner "chose to solely respond to the DHS's appeal" of the IJ's grant of Sec-

tion 212(c) relief; failed to file a motion to remand proceedings based on ineffective assistance of counsel while the case was pending appeal before the Board; and delayed "until almost 3 months after [the Board's] February 25, 2005 decision to raise his ineffective assistance of counsel claim." *Ibid.* (brackets in original). Finally, the court concluded that petitioner's due process claim based on alleged ineffective assistance of counsel was foreclosed by its decision in *Afanwi* v. *Mukasey*, 526 F.3d 788, 796-799 (4th Cir. 2008), cert. granted, judgment vacated and remanded, No. 08-906 (Oct. 5, 2009), which it described as holding "that an alien's 'counsel's actions do not implicate the Fifth Amendment,' such that the counsel's alleged ineffectiveness [in civil removal proceedings] does 'not deprive [an alien] of due process.'" Pet. App. 13a-14a (citation omitted).

b. Turning to petitioner's "seek[ing] to revisit his original concession of deportability on * * * substantive ground[s] * * *, rather than through the portal of an ineffective assistance of counsel * * * claim," the court of appeals dismissed petitioner's "claim that he is not deportable as a convicted aggravated felon * * * for lack of jurisdiction." Pet. App. 14a, 20a. Relying upon its case law and that of other circuits, the court held that, under 8 U.S.C. 1252(d)(1), petitioner may not raise an issue to the court that he did not raise previously before the IJ and the Board and that, therefore, the court lacked jurisdiction to consider petitioner's claim. Pet. App. 14a-17a. The court was not persuaded by petitioner's argument that he had no reason to raise the deportability issue before the Board because DHS had appealed the separate issue of the IJ's grant of a Section 212(c) waiver. *Id.* at 17a-18a. The court held that, by conceding deportability before the IJ, petitioner

"declined to raise the [deportability] issue * * * before the IJ; that he, therefore, failed to exhaust his administrative remedies; and that the court thus lacked jurisdiction to consider the issue. *Ibid.* Finally, the court held that, under *Bowles* v. *Russell*, 551 U.S. 205 (2007), petitioner "may not rely on a 'miscarriage of justice' argument to revisit his concession of deportability and circumvent his failure to exhaust administrative remedies." Pet. App. 18a-20a. The court held that, because it "may not create an equitable exception to [S]ection 1252(d)(1)'s exhaustion requirement," it lacked jurisdiction to consider the merits of petitioner's claim that he had not been convicted of an aggravated felony that rendered him deportable. *Id.* at 20a.

ARGUMENT

Petitioner challenges (Pet. 11-29) the court of appeals' holding that the exhaustion requirement in 8 U.S.C. 1252(d)(1) is mandatory, jurisdictional, and not subject to judicially created equitable exceptions. That holding is correct, and it does not directly conflict with any decision of this Court or of any court of appeals—especially since the briefs in the court of appeals do not bear out petitioner's repeated statements (Pet. 9, 12, 19, 20, 26-27) that the government failed to raise in the court of appeals petitioner's concession of deportability before the IJ and the Board. Further review of the first question presented is therefore not warranted.

Petitioner also renews his claim (Pet. 30-34) that he had a constitutional right to effective performance by his privately retained counsel in removal proceedings. Relying on circuit precedent that has since been vacated on other grounds, the court of appeals correctly held that there is no Fifth Amendment right to effective perfor-

mance by privately retained counsel in removal proceedings. Because the case law in the courts of appeals on the constitutional question is still developing, this Court's review is unwarranted.

1. a. Exhaustion doctrines generally "provide[] 'that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'" *McKart* v. *United States*, 395 U.S. 185, 193 (1969) (quoting *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938)). As this Court has explained, requiring administrative exhaustion serves a number of important purposes, including "preventing premature interference with agency processes"; allowing the agency to "function efficiently" and "correct its own errors"; providing the "parties and the courts the benefit of [agency] experience and expertise"; assuring the development of a record "adequate for judicial review"; and affording the agency an opportunity to decide whether a claim is "invalid" on other grounds or whether relief may be granted "under a different section of the Act." *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975); accord *McKart*, 395 U.S. at 193-194. Where Congress has specified by statute that exhaustion is required, a court may not "dispens[e]" with that requirement based on the court's own assessment that exhaustion would be "futil[e]." *Salfi*, 422 U.S. at 766. The Court reiterated that point more categorically in *Booth* v. *Churner*, 532 U.S. 731 (2001), explaining that it "will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise." *Id.* at 741 n.6.

In this case, Congress has specified in the INA that judicial review of a final order of removal is contingent on exhaustion of the administrative remedies "available

to the alien as of right." 8 U.S.C. 1252(d)(1). The statutory framework, which requires an IJ to advise an alien of his "right to appeal" a removal order, 8 U.S.C. 1229a(c)(5), plainly allocates initial appellate review to the Board and makes such an appeal "available as of right" within the meaning of the exhaustion mandate in Section 1252(d)(1). That conclusion is reinforced by 8 U.S.C. 1101(a)(47)(B), which specifies that an IJ's removal order becomes final only upon affirmance by the Board or upon expiration of the appeal period if no appeal to the Board is taken, whichever is earlier. Whether the Board would ultimately rule for the alien on the merits is irrelevant to whether an appeal to the Board—the relevant procedural remedy here—is "available to the alien as of right." And, consistent with Congress's directives, Department of Justice regulations provide that an IJ's removal order may not be executed during the appeal period or while review of the order is pending before the Board. 8 C.F.R. 1003.6(a). Cf. *Darby* v. *Cisneros*, 509 U.S. 137, 154 (1993) (concluding that "where the APA applies, an appeal to 'superior agency authority' is a prerequisite to judicial review *only* when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review").

That statutory mandate of exhaustion serves to vest exclusive initial appellate jurisdiction in the agency. See *Bowles* v. *Russell*, 551 U.S. 205, 212-213 (2007) ("Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them."). Given the statutory underpinnings of the exhaustion requirement in removal proceedings, the court of appeals correctly applied this Court's decision in *Bowles* when it con-

cluded that the requirement is mandatory and that petitioner's decision not to exercise his right to challenge his deportability before the Board precluded the court from considering that question. Pet. App. 16a-20a. As this Court recognized in *Bowles*, Congress has not authorized the federal courts to excuse non-compliance with statutory prerequisites to judicial review, and such judicially created exceptions "would no doubt detract from the clarity of the rule." 551 U.S. at 214.

Against that background, the court of appeals correctly concluded that it lacked jurisdiction over petitioner's claim of non-deportability. "A court may review a final order of removal only if * * * the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. 1252(d)(1). As petitioner implicitly concedes, exhaustion of administrative remedies requires at a minimum that an alien first present his claim to the IJ and that he then pursue his claim on appeal to the Board. Petitioner did neither here. See Pet. 20 (describing 8 U.S.C. 1252(d)(1) as requiring that an alien "fully proceed before the agency prior to pursuing judicial review"), 21 (acknowledging that several courts of appeals have held that a court may not entertain a petition for review where an alien failed to proceed at all before the agency). Rather, petitioner affirmatively conceded his deportability before the IJ and then failed to seek to withdraw that concession or otherwise challenge his deportability when his case was on appeal to the Board—focusing instead on the question of whether he was entitled to discretionary relief from removal. Petitioner thereby failed to avail himself of his prescribed administrative remedies as to any claim of non-deportability. Cf. *United States* v. *Broce*, 488 U.S. 563 (1989) (criminal defendant who pleads guilty cannot

later contend that the charge did not establish a crime or that he had a good defense). The court of appeals correctly concluded that petitioner's failure to exhaust administrative remedies barred its review of his claim.

b. Petitioner contends (Pet. 20-26) that there is a fundamental difference between exhaustion of remedies and issue exhaustion, and that Section 1252(d)(1) requires only the former. As an initial matter, petitioner's characterization of this case as one involving mere issue exhaustion is itself flawed. Petitioner did not merely fail to raise the question of his deportability on appeal to the Board; he affirmatively *conceded* before the IJ that he is deportable, seeking only relief from ensuing deportation under Section 212(c).

In any event, petitioner does not address this Court's emphasis that when agency regulations require issue exhaustion, "courts reviewing agency action regularly ensure against the bypassing of that requirement by refusing to consider unexhausted issues." *Sims* v. *Apfel*, 530 U.S. 103, 108 (2000). Thus, "since the BIA's regulations do require issue exhaustion," the Second Circuit has, for example, "long held that issue exhaustion is mandatory" in proceedings to review a Board decision. *Zhong* v. *United States Dep't of Justice*, 489 F.3d 126, 131 (2d Cir. 2007) (Calabresi, J., concurring in the denial of rehearing en banc) (citing 8 C.F.R. 1003.3). Moreover, as this Court has explained, "the rationale for requiring issue exhaustion is at its greatest" in "an adversarial administrative proceeding," *Sims*, 530 U.S. at 110, like the one petitioner had before the Board.

Accordingly, even if the exhaustion requirement in Section 1252(d)(1) were not jurisdictional (in the absolute sense that it could not be waived by the government), it would still be mandatory, and thus preclude

petitioner's claim. See *Greenlaw* v. *United States*, 128 S. Ct. 2559, 2564-2567 (2008) (declining to decide whether a statutory requirement that the government appeal or cross-appeal a criminal sentence is "jurisdictional," but recognizing no judicial discretion to make exceptions to that requirement); *Eberhart* v. *United States*, 546 U.S. 12, 18 (2005) (per curiam) (explaining that, even when a time limit in a procedural rule is not "jurisdictional," the court's duty to apply it is "mandatory" when the other party raises an objection).

c. Because a non-jurisdictional requirement can still be "mandatory" for a court when the other party raises an objection, this case is a poor vehicle for testing the "jurisdictional" nature of the exhaustion requirement in Section 1252(d)(1).

Petitioner's efforts to establish that issue exhaustion is not jurisdictional are ultimately in service of his attempt to show that it can be "waived in certain, well-settled circumstances." Pet. 9. He claims those circumstances are present here because this is "the rare case * * * where (1) the government has waived its argument that an alien has not exhausted an issue, (2) that issue is a purely legal question, and (3) manifest injustice would result from the court's failure to reach the issue." Pet. 26. Although he relies on the concatenation of all three of those factors more than once (Pet. 9, 12, 26), he places particular emphasis on the government's alleged failure to "invoke exhaustion on appeal" (Pet. 20).

In this case, however, it is simply not true that petitioner's failure to exhaust was waived by the government in the court of appeals. To the contrary, in its opposition in the court of appeals to petitioner's motion to

hold his first petition for review in abeyance, the government expressly stated as follows:

> The habeas petition, once transferred here, will still not confer jurisdiction on this Court to review the ground on which [petitioner] was removed because *he failed to exhaust his administrative remedies* with regard to any such challenge *(by never contesting his deportability below)*. 8 U.S.C. § 1252(d)(1) ("A court may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as of right.").

05-1329 Resp. C.A. Mot. to Dismiss and Opp. to Pet'r Mot. to Hold Case in Abeyance 14 n.5 (filed June 10, 2005) (emphases added). When petitioner later filed his opening brief in the consolidated proceeding involving his habeas petition and two petitions for review, he referred back to that very point, stating: "The Government has argued in this case that the merits of [petitioner's] deportability are not before this Court because [petitioner] did not properly raise that issue before the BIA during his initial removal proceedings." Pet. C.A. Br. 37. Then, in its own brief in the consolidated proceeding, the government repeated the substance of the exhaustion argument that petitioner had already paraphrased (albeit without citing Section 1252(d)(1)). See Resp. C.A. Br. 12 ("[Petitioner] conceded before the IJ that he was deportable as charged * * * . Thus, it is wholly improper for [petitioner] to seek to collaterally attack this concession by implying this Court can directly review the question of removability in this petition for review.").

The court of appeals itself never suggested that the government had waived petitioner's failure to exhaust his claim that he was not deportable. To the contrary, the court said at the beginning of its discussion of deportability that "[petitioner] does not dispute that he failed to raise the issue before either the IJ or the [Board]." Pet. App. 14a. It would, to say the least, be odd to rely on petitioner's failure to "dispute" something if the court thought it had not even been raised by the government. In addition, when discussing its inability to create equitable exceptions to the exhaustion requirement, the court of appeals specifically discussed exceptions for a "miscarriage of justice" or "manifest injustice," but not any waiver by the government. *Id.* at 14a, 18a-20a.[4]

d. Because the government did not waive petitioner's failure to exhaust, there is no direct conflict in the courts of appeals. Indeed, petitioner's claims of conflict depend almost entirely on the government's purported waiver of exhaustion. Petitioner says (Pet. 12) that the decision below "squarely conflicts with decisions of the Second and Seventh Circuits," because those circuits have held that exhaustion can be waived by the government. Thus, petitioner describes (Pet. 13) the Seventh Circuit's decision in *Abdelqadar* v. *Gonzales*,

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[4] The implication that the court of appeals did not perceive the government to have waived the exhaustion point is strengthened by the fact that—notwithstanding the statement in petitioner's opening brief—petitioner affirmatively argued in his reply brief that the government had "waived any argument that [petitioner] failed to exhaust the issue of his deportability." Pet. C.A. Reply 7 n.5. Nevertheless, the court of appeals did not include waiver among the exceptions that it felt constrained not to recognize by its characterization of the exhaustion requirement as jurisdictional.

413 F.3d 668 (2005), as "[e]mphasizing that the government failed to raise exhaustion in its appellate brief," and he quotes (Pet. 13) the Seventh Circuit's statement in *Korsunskiy* v. *Gonzales*, 461 F.3d 847 (2006), that an agency "may waive or forfeit the exhaustion issue." *Id.* at 849. Petitioner similarly describes the Second Circuit as holding "that the statutory requirement of issue exhaustion is 'mandatory (and hence waivable)' but is not jurisdictional." Pet. 14 (quoting *Lin Zhong* v. *United States Dep't of Justice*, 480 F.3d 104, 107 (2d Cir. 2007)).

Furthermore, petitioner's characterization of the Fourth Circuit as being an outlier "even in the 'jurisdictional' circuits," depends on his conclusion that none of the other circuits "has actually held that a court of appeals lacks power to entertain a challenge to a removal order where the government has not argued that the challenge is barred because it was not properly exhausted before the agency." Pet. 19 (emphasis omitted). He characterizes Sixth Circuit cases as recognizing an exception to the exhaustion requirement when the government does not argue failure to exhaust on appeal. Pet. 15-16 (discussing *Al-Najar* v. *Mukasey*, 515 F.3d 708, 713 n.2 (2008); *Badwan* v. *Gonzales*, 494 F.3d 566, 571 (2007)).

The other cases he cites (Pet. 16-18)—from the First, Eighth, Ninth, and Tenth Circuits—do not establish a direct conflict either, since they discussed different potential exceptions to the exhaustion requirement without finding them applicable or even necessarily available. See *Batrez Gradiz* v. *Gonzales*, 490 F.3d 1206 (10th Cir. 2007) (analyzing miscarriage-of-justice exception, but finding it inapplicable in that case); *Frango* v. *Gonzales*, 437 F.3d 726, 728-729 (8th Cir. 2006) (mentioning cases from non-immigration contexts that recognized excep-

tions to exhaustion requirements, but finding none applicable to the "adversarial" proceedings "before the IJ and the BIA"); *Sun* v. *Ashcroft*, 370 F.3d 932, 942-944 (9th Cir. 2004) (suggesting there may be a futility exception to Section 1252(d)(1)'s exhaustion requirement, but finding any such exception "cannot be broader than that encompassed by the futility exception to prudential exhaustion requirements" and thus could not be satisfied in that case); *Sousa* v. *INS*, 226 F.3d 28, 32 (1st Cir. 2000) (finding it "unnecessary * * * to decide whether, in a case that threatened a miscarriage of justice, we could forgive the failure to raise a clearly meritorious claim in the removal proceedings"). Moreover, almost all of those decisions preceded this Court's decision in *Bowles*, *supra*, which caused the Second Circuit to overrule prior opinions to the extent that they had recognized a "'manifest injustice' exception to [Section] 2152(d)(1)'s exhaustion requirement." *Grullon* v. *Mukasey*, 509 F.3d 107, 115-116 (2007), cert. denied, 129 S. Ct. 43 (2008). The only exception is the Tenth Circuit's decision in *Batrez Gradiz*, which post-dated *Bowles* by only six days and did not mention it at all.[5]

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[5] Although petitioner briefly discusses (Pet. 28-29) a miscarriage-of-justice exception, as the court of appeals explained here (Pet. App. 12a), petitioner's argument that he is not deportable depends on Supreme Court and court of appeals cases that postdated the IJ's 1998 decision (*id.* at 51a-53a) that he was deportable. Cf. *In re Malone*, 11 I. & N. Dec. 730, 731-732 (B.I.A. 1966) (suggesting that collateral challenges based on a "gross miscarriage of justice" are available in cases in which deportation was inappropriate "at the time of the original proceeding," but are not available on the basis of "an interpretation of law made subsequent to the time of the original deportation decision"). Furthermore, because a manifest-injustice exception—to the extent one were available—would be "equitable" in nature, *Grullon*, 509 F.3d at 115, it is surely relevant that petitioner's criminal conduct, which included the

Accordingly, it is not at all clear that petitioner would have had his claim of non-deportability adjudicated in any of the other circuits he cites.

e. Finally, petitioner argues (Pet. 28-29) that he did in fact exhaust his claim, and that the court of appeals therefore erred in not finding that he exhausted his non-deportability claim by raising it before the Board in a motion to reopen. That factbound claim does not warrant further review (but would, if true, obviate any need to address any of petitioner's arguments about the legal nature of the exhaustion requirement). In any event, petitioner essentially invited any error by claiming in the court of appeals that he had "timely raised in the BIA *the ineffectiveness claim* in a motion to reopen," not the underlying question of deportability. Pet. C.A. Br. 37 (emphasis added). The Board rejected that ineffectiveness claim, as did the court of appeals, without needing to address the underlying question of deportability. Moreover, petitioner could have presented his non-deportability claim either during the initial appeal before the Board—which was handled by his second counsel, against whom petitioner has never asserted a claim of ineffective assistance—or in a motion to remand during the pendency of that Board appeal.

2. Petitioner contends (Pet. 30-34) that the concession of deportability by his first privately retained counsel constituted ineffective assistance that deprived him of due process in violation of the Fifth Amendment. Further review of that claim is unwarranted.

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violation of a court order to avoid contact with his wife (Pet. App. 28a), has furnished an independent ground of deportability for such actions occurring since 1996, see 8 U.S.C. 1227(a)(2)(E)(ii); *In re Gonzalez-Silva*, 24 I. & N. Dec. 218, 220 (B.I.A. 2007).

a. Petitioner "adopts and incorporates by reference the legal arguments" that were made in the petition for a writ of certiorari in *Afanwi* v. *Holder*, No. 08-906, which was pending when he filed his own petition. On October 5, 2009, this Court granted the certiorari petition in *Afanwi*, vacated the Fourth Circuit's judgment, and remanded "for further consideration in light of the position asserted by the Solicitor General in her brief for the respondent filed August 26, 2009." 08-906 Docket entry (Oct. 5, 2009). The position asserted by the Solicitor General in that brief was that the Fourth Circuit in *Afanwi* correctly held that the Fifth Amendment does not confer a right to have an order of removal set aside based on ineffective assistance by privately retained counsel in immigration proceedings (see Br. in Resp. at 10-12, *Afanwi*, *supra* (No. 08-906)), but nevertheless erred in affirming the Board's determination in that case that it lacked jurisdiction to consider in the first instance whether it should grant administrative relief for allegedly ineffective assistance of counsel that occurred after entry of a final order of removal (see *id.* at 14-16).

b. The court of appeals correctly held in this case that the Fifth Amendment does not confer a right to effective assistance by privately retained counsel in immigration proceedings. Pet. App. 13a-14a. This Court has explained that when the government is not constitutionally required to furnish counsel in the relevant proceedings, the errors of privately retained counsel are not imputed to the government. See *Coleman* v. *Thompson*, 501 U.S. 722, 752-754 (1991). When "[t]here is no constitutional right to an attorney" furnished by the government in a particular kind of proceeding, a client "cannot claim constitutionally ineffective assistance of counsel in

such proceedings"; in that situation, the attorney performs in a private capacity as the client's agent, not a state actor, and the client therefore must "'bear the risk of attorney error.'" *Id.* at 752-753 (quoting *Murray* v. *Carrier*, 477 U.S. 478, 488 (1986)). In "our system of representative litigation . . . each party is deemed bound by the acts of his lawyer-agent." *Id.* at 753 (quoting *Link* v. *Wabash R.R.*, 370 U.S. 626, 634 (1962)).

There is no constitutional right to appointed counsel in immigration proceedings. Indeed, while Congress has recognized the "privilege" of being represented by counsel of the alien's choice, it has expressly provided that such representation shall be "at no expense to the Government." 8 U.S.C. 1229a(b)(4)(A), 1362; cf. 28 U.S.C. 1654 (parallel provision providing that a party may appear through counsel in any court of the United States). Accordingly, when an alien has invoked that statutory privilege and retained a lawyer to represent him in removal proceedings or in filing a petition for review, counsel's actions are not those of the government, but are instead attributed to the client.

Petitioner incorporates (Pet. 31) the argument from the *Afanwi* petition that the "state action" that is needed to find a due process violation in this context arises when the government relies on the removal order at the end of the proceeding. See Pet. at 26, *Afanwi*, *supra* (No. 08-906). But that contention proves too much, because it would preclude the government from relying on any civil court order without exposing itself to the risk of collateral litigation about asserted malpractice on the part of opposing counsel. Similarly, the incorporated attempt (see *id.* at 19-20) to distinguish removal proceedings from other civil litigation also fails. The *Afanwi* petition argued that, because a removal

proceeding threatens to impose such a great loss on an alien, it is "barely distinguishable from criminal condemnation" and thus triggers a Fifth Amendment right to the effective assistance of counsel analogous to that available in the criminal context. *Id.* at 19 (quoting *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 119 (1996)). This Court, however, has resisted calls to view immigration proceedings as equivalent to criminal trials. See *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("Consistent with the civil nature of the [immigration] proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing."); see also *Negusie* v. *Holder*, 129 S. Ct. 1159, 1169 (2009) (Scalia, J., concurring) ("This Court has long understood that an 'order of deportation is not a punishment for crime.'") (quoting *Fong Yue Ting* v. *United States*, 149 U.S. 698, 730 (1893)). And if it were the case that immigration proceedings should be treated like criminal proceedings with respect to issues of legal representation, the Constitution would require the government to furnish counsel to those facing removal proceedings. But there is no such constitutional requirement, and petitioner does not contend otherwise. In the absence of any requirement of that kind, claims like petitioner's—which concern only privately retained counsel—have no apparent basis.

c. Petitioner correctly explains (Pet. 30-31) that there is disagreement in the courts of appeals about whether aliens in immigration proceedings have a Due Process Clause entitlement to effective performance by their privately retained counsel. The Seventh Circuit and the Eighth Circuit have held there is no such constitutional right. See *Magala* v. *Gonzales*, 434 F.3d 523,

525-526 (7th Cir. 2005);[6] *Rafiyev* v. *Mukasey*, 536 F.3d 853, 861 (8th Cir. 2008). So did the Fourth Circuit in its recently vacated opinion in *Afanwi*. 526 F.3d at 796-799. By contrast, a number of other circuits have suggested or held that the Due Process Clause creates a right to assistance by counsel that is sufficiently effective to prevent removal proceedings from being fundamentally unfair. See *Zeru* v. *Gonzales*, 503 F.3d 59, 72 (1st Cir. 2007); *Aris* v. *Mukasey*, 517 F.3d 595, 600-601 (2d Cir. 2008); *Fadiga* v. *Attorney Gen.*, 488 F.3d 142, 155 (3d Cir. 2007); *Denko* v. *INS*, 351 F.3d 717, 723-724 (6th Cir. 2003); *Nehad* v. *Mukasey*, 535 F.3d 962, 967 (9th Cir. 2008); *Tang* v. *Ashcroft*, 354 F.3d 1192, 1196 (10th Cir. 2003); *Dakane* v. *United States Att'y Gen.*, 399 F.3d 1269, 1273-1274 (11th Cir. 2005).

Notwithstanding that disagreement among the courts of appeals, this Court should not resolve the constitutional question at this time. Jurisprudence on the issue is still developing in the courts of appeals. Notwithstanding the trend of the earlier decisions, the Fourth and Eighth Circuits decided last year that there is no constitutional entitlement. See *Rafiyev*, 536 F.3d at 861; *Afanwi*, 526 F.3d at 796-799. And a recent Ninth Circuit decision "assume[d]" without deciding that aliens have "a constitutional right to the assistance of counsel

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[6] As petitioner notes (Pet. 31 n.14), other Seventh Circuit decisions do contemplate that counsel in immigration proceedings "may be so ineffective as to have impinged upon the fundamental fairness of the hearing in violation of the fifth amendment due process clause." *Mojsilovic* v. *INS*, 156 F.3d 743, 748 (1998) (quoting *Castaneda-Suarez* v. *INS*, 993 F.2d 142, 144 (7th Cir. 1993)). Petitioner also quotes (Pet. 31 n.14) the passing reference to the Fifth Amendment in *Sanchez* v. *Keisler*, 505 F.3d 641, 647 (7th Cir. 2007), but the court's holding there was that the alien "did not have the fair hearing to which *the immigration statutes* entitle her." *Id.* at 649 (emphasis added).

in immigration proceedings." *Alcala* v. *Holder*, 563 F.3d 1009, 1015 n.11 (2009).

d. In any event, resolution of the constitutional question here would not aid petitioner, because his first counsel was not ineffective. As the court of appeals concluded, the state of the law at the time of petitioner's 1998 deportation hearing supported his counsel's decision to concede petitioner's deportability. Pet. App. 11a-13a. That decision was thus not unreasonable. *Id.* at 12a-13a. Moreover, as the court of appeals noted (*id.* at 13a), "[s]uch a concession is particularly understandable in light of counsel's decision" to apply for a Section 212(c) waiver (an application that met with success before the IJ). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Knowles* v. *Mirzayance*, 129 S. Ct. 1411, 1420 (2009) (brackets in original) (quoting *Strickland* v. *Washington*, 466 U.S. 668, 690 (1984)).

In addition, petitioner failed to exercise due diligence in pursuing his claim, which is a prerequisite for seeking reopening on the basis of a claim of ineffective assistance. See, *e.g.*, *Rashid* v. *Mukasey*, 533 F.3d 127, 132 (2d Cir. 2008) (explaining that an alien claiming ineffective assistance of counsel "is required to exercise due diligence both before and after he has or should have discovered ineffective assistance of counsel"). Rather than raising a claim of ineffective assistance while his case was on direct appeal to the Board—and while he was being represented by new counsel whom he does not allege to have been ineffective—petitioner delayed bringing any such claim until almost three months after the Board had already reversed the grant of Section 212(c) relief. Pet. App. 13a, 22a-23a. To countenance

petitioner's decision not to claim ineffective assistance during his original proceedings would reward delay in a context where "every delay works to [his] advantage." *INS* v. *Doherty*, 502 U.S. 314, 323 (1992); see *INS* v. *Abudu*, 485 U.S. 94, 108 (1988) ("Granting such motions too freely will permit endless delay of deportation."). Because the court of appeals properly found that the Board did not abuse its discretion in denying petitioner's motion to reopen (Pet. App. 13a), resolution of the constitutional question is unnecessary and would not alter the outcome of the proceedings below. Further review of petitioner's constitutional claim is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 08-1392

IN THE

Supreme Court of the United States

NIMATALLAH SHAFIK MASSIS,
Petitioner,

v.

ERIC HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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IN THE

Supreme Court of the United States

No. 08-1392

NIMATALLAH SHAFIK MASSIS,

Petitioner,

v.

ERIC HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondents do not dispute that petitioner Massis is not deportable as charged, but they claim that no court has the power to vacate Massis's removal order on appeal because Massis's first lawyer (erroneously) conceded his deportability at his initial removal hearing. There is a deep circuit split as to whether 8 U.S.C. § 1252(d)(1) deprives courts of jurisdiction to review unexhausted issues. Massis's related claim that his lawyer's erroneous concession amounted to ineffective assistance of counsel also raises an important question—whether the Due Process Clause provides protection against ineffective assistance of counsel in re-

moval proceedings—that has divided the circuits. Both issues warrant this Court's review.

I. THE CIRCUITS DISAGREE ON WHETHER ISSUE EXHAUSTION IS A JURISDICTIONAL REQUIREMENT

There is a widespread split among the circuits regarding whether 8 U.S.C. § 1252(d)(1) creates a jurisdictional bar to judicial review of unexhausted issues. Pet. 11-20.[1] Respondents do not dispute the disagreement among the circuits. Instead, they focus on ancillary arguments irrelevant to this Court's consideration of the jurisdictional question.

Respondents first argue (Opp. 10, 17-19) that the Fourth Circuit's decision does not widen the conflict because the government did not waive the exhaustion requirement below. But whether the government in fact waived the exhaustion requirement only begs the legal question to be resolved by this Court: whether Section 1252(d)(1) imposes a jurisdictional issue-

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[1] The Second and Seventh Circuits have held that Section 1252(d)(1) does not deprive courts of appeals of jurisdiction to review issues not raised before the IJ and the BIA. *See Lin Zhong* v. *DOJ*, 480 F.3d 104, 121-122 (2d Cir. 2007); *Abdelqadar* v. *Gonzales*, 413 F.3d 668, 670-671 (7th Cir. 2005). Nine other circuits have come to a different conclusion, but of those nine, five permit or have discussed prudential exceptions, suggesting their "jurisdictional" rule is not truly jurisdictional. *See, e.g., Batrez Gradiz* v. *Gonzales*, 490 F.3d 1206, 1209-1210 (10th Cir. 2007). And three of the nine have implied their prior precedent erred in construing Section 1252(d)(1) as imposing a jurisdictional issue exhaustion bar. *See, e.g., Lin* v. *Attorney Gen. of the U.S.*, 543 F.3d 114, 120 & n.6 (3d Cir. 2008). Even within these circuits, there is significant confusion. *See* Pet. 13 n.6; *see also Mambwe* v. *Holder*, 572 F.3d 540, 550 (8th Cir. 2009).

exhaustion bar.[2] If it does, then the government's failure to argue exhaustion is of no consequence, for the court of appeals would have been obliged to find itself without jurisdiction. Indeed, because the court of appeals ruled that it lacked jurisdiction to consider Massis's legal challenge to his removal order, it did not consider either the waiver question or Massis's argument that his removal would result in a miscarriage of justice. But if this Court were to hold that Section 1252(d)(1) is not a jurisdictional issue-exhaustion provision, then (and only then) would it be necessary to consider the circumstances (including government waiver) under which the Fourth Circuit, or any other court, might exercise its jurisdiction to consider an issue conceded below.

Equally unavailing is Respondents' reliance on *Bowles* v. *Russell*, 551 U.S. 205 (2007). As Massis has explained (Pet. 25-26), *Bowles*, if anything, suggests that issue exhaustion is properly understood as a nonjurisdictional "claims-processing rule," not a true jurisdictional rule that restricts a court's *power* to decide a case. Moreover, the circuit conflict has persisted after *Bowles*: although some of the "jurisdictional" circuits have relied on *Bowles* to maintain their jurisdictional approach, *see, e.g.*, *Omari* v. *Holder*, 562 F.3d 314, 324 (5th Cir. 2009), the "nonjurisdictional" circuits have since reaffirmed their position, *see, e.g.*, *Cisneros-Cornejo* v. *Holder*, 330 F. App'x 616, 618 (7th Cir. 2009); *Singh* v. *Mukasey*, 294 F. App'x 668, 669 (2d Cir. 2008). Some panels in the "jurisdictional" circuits have also continued to question circuit precedent that Section

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[2] Respondents' argument that the government did not waive the exhaustion requirement below is also wrong. *See* pp. 7-8, *infra*.

1252(d)(1) is jurisdictional in nature. *See Hoxha* v. *Holder*, 559 F.3d 157, 159 n.3 (3d Cir. 2009); *Manani* v. *Filip*, 552 F.3d 894, 900 n.4 (8th Cir. 2009). The circuit conflict remains unresolved after *Bowles*, and this Court's review is needed to clarify whether courts of appeals have jurisdiction to consider unexhausted issues.[3]

II. THE FOURTH CIRCUIT ERRONEOUSLY CONCLUDED IT LACKED JURISDICTION TO CONSIDER MASSIS'S LEGAL CHALLENGE TO HIS DEPORTABILITY

Massis has shown (Pet. 20-29) that the Fourth Circuit's decision is incorrect in two respects: (1) Section 1252(d)(1) does not speak to *issue* exhaustion at all but requires only that the alien proceed before the agency before seeking judicial review—ordinary issue exhaustion rules therefore apply; and (2) ordinary exhaustion rules are not jurisdictional, and therefore the reviewing court has the power to consider issues not presented (or conceded) below in certain limited circumstances. Respondents offer no meaningful response to these points.

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[3] Respondents' reliance (Opp. 19) on *Valenzuela Grullon* v. *Mukasey*, 509 F.3d 107 (2d Cir. 2007), *cert. denied*, 129 S. Ct. 43 (2008), is unavailing. In *Valenzuela Grullon*, the petitioner failed to appeal to the BIA altogether, and the Second Circuit held that it lacked authority to excuse the petitioner's failure to exhaust *remedies* as required by Section 1252(d)(1). *Id.* at 112, 115-116. *Valenzuela Grullon* did not address the separate question of *issue* exhaustion presented here.

A. Respondents Improperly Conflate The Remedy Exhaustion Required By Section 1252(d)(1) With Issue Exhaustion

Respondents make no attempt to rebut Massis's showing (Pet. 20-24) that Section 1252(d)(1) does not mandate *issue* exhaustion, and that such a rule should not be presumed from the statute's requirement that an alien exhaust administrative remedies before seeking judicial review.[4] Respondents instead conflate Section 1252(d)(1)'s remedy-exhaustion requirement with issue exhaustion. They argue, for example (Opp. 13), that Massis "implicitly concedes" that the statute "requires at a minimum that an alien first present his claim to the IJ and that he then pursue his claim on appeal to the Board." But Massis simply acknowledged that, under Section 1252(d)(1), an alien may not bypass the BIA altogether, *i.e.*, by failing to appeal to the BIA at all—not that the statute requires a petitioner to raise in the agency each issue presented in his petition for review. *See* Pet. 20-24.

Respondents also argue that BIA *regulations* require issue exhaustion. Those regulations do not resolve the issue in this case. The regulations do not speak in jurisdictional terms, *see* 8 C.F.R. 1003.3(b), thereby admitting the possibility of prudential exceptions, and, in any event, only Congress has the power to determine federal court jurisdiction, *Kontrick* v. *Ryan*, 540 U.S. 443, 452 (2004); *see also Lin Zhong* v. *DOJ*, 489

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[4] Respondents claim that this case does not involve "mere issue exhaustion" because Massis "*conceded*" before the immigration judge that he is deportable. Opp. 14 (emphasis in original). But they do not explain what difference that makes in interpreting Section 1252(d)(1).

F.3d 126, 132 (2d Cir. 2007) (Calabresi, J., concurring in denial of reh'g en banc). It is therefore up to the courts to decide whether they may review unexhausted issues, and on that question the circuits are deeply divided.[5]

B. If Issue Exhaustion Is Not A Jurisdictional Requirement, Then It May Be Waived Or Overlooked

Respondents argue (Opp. 14) that, even if Section 1252(d)(1) does not impose a jurisdictional issue-exhaustion requirement, issue exhaustion would still be "mandatory" and thus preclude Massis's deportability argument. This argument is flawed on multiple grounds.

First, Section 1252(d)(1) does not address issue exhaustion, and thus does not make it mandatory as a statutory matter. *See Lin Zhong* v. *DOJ*, 480 F.3d 104, 121 (2d Cir. 2007). By contrast, the two cases cited by Respondents (Opp. 14) concerned specific rules, which, even if not jurisdictional, were mandatory. *See*

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[5] Respondents' citation of *United States* v. *Broce*, 488 U.S. 563 (1989), adds nothing. In *Broce*, this Court held that two criminal defendants could not collaterally challenge their voluntary and counseled plea agreements. The Court stressed the procedural protections unique to the criminal context, including the hearing and plea colloquy required by Federal Rule of Criminal Procedure 11, to ensure that a guilty plea is voluntary and knowing. *Id.* at 570. Massis, of course, did not have these protections in his civil removal proceedings. Moreover, the *Broce* Court noted that the defendants were advised by constitutionally competent counsel. *Id.* at 574. By stark contrast, the Fourth Circuit held that Massis did not have a constitutional right to effective assistance of counsel at the immigration hearing where Massis's lawyer conceded his deportability. Pet. App. 13a-14a.

Greenlaw v. *United States*, 128 S. Ct. 2559, 2564-2567 (2008) (rule that government appeal or cross-appeal a criminal sentence); *Eberhart* v. *United States*, 546 U.S. 12, 18 (2005) (per curiam) (time limit in procedural rule).

Second, even if issue exhaustion were mandatory, it would still be subject to waiver by the government. *See, e.g., Lin Zhong*, 489 F.3d at 132; *Abdelqadar* v. *Gonzales*, 413 F.3d 668, 670-671 (7th Cir. 2005). Respondents waived exhaustion in this case—or, at least, a court could readily so conclude. Respondents admit that their *only* specific mention of the statute was in the last footnote of a motion to dismiss filed more than two years before the parties briefed the merits of the case to the Fourth Circuit. Opp. 16 (citing Resp. C.A. Mot. 14 n.5 (filed June 10, 2005)). Raising exhaustion in a footnote was insufficient to preserve the point even for purposes of that motion, let alone going forward. *See, e.g., IGEN Int'l, Inc.* v. *Roche Diagnostics GmbH*, 335 F.3d 303, 309 n.3 (4th Cir. 2003).[6] And in their merits brief, Respondents did not even cite Section 1252(d)(1); they merely noted Massis's concession of deportability and then asserted without analysis that it was "improper" for Massis to collaterally attack his concession. Resp. C.A. Br. 12.[7] Massis argued in his

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[6] *See also Universal City Studios, Inc.* v. *Corley*, 273 F.3d 429, 445 (2d Cir. 2001) ("[W]e have repeatedly ruled that arguments presented to us only in a footnote are not entitled to appellate consideration."); *United States* v. *Dairy Farmers of Am., Inc.*, 426 F.3d 850, 856 (6th Cir. 2005) (same).

[7] Respondents' failure to press exhaustion in their merits brief confirms their waiver. *See Hillman* v. *IRS*, 263 F.3d 338, 343 n.6 (4th Cir. 2001) (failure to comply with FRAP 28(b), which, by reference to FRAP 28(a)(9)(A), requires a merits brief to contain

reply brief that Respondents waived exhaustion, *see* Pet. C.A. Reply Br. 1, but the Fourth Circuit did not reach the issue once it concluded that Section 1252(d)(1) imposed a jurisdictional issue-exhaustion requirement.

Moreover, even apart from waiver, other exceptions to ordinary principles of issue exhaustion should apply here. In particular, courts have recognized an exception to prevent an injustice that would otherwise result. *See* Pet. 28-29. The miscarriage of justice in Massis's case is particularly compelling for at least three reasons. First, it is undisputed that Massis is not removable as charged.[8] The government did not argue in the Fourth Circuit that Massis is removable as charged, and does not so argue in this Court.[9] Second,

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the appellees' "contentions and the reasons for them," results in waiver of that argument on appeal).

[8] Even were it disputed, an exception to exhaustion would be warranted where, as here, no facts are in dispute and the issue is purely legal.

[9] Respondents argue (Opp. 19 n.5) that decisions confirming Massis's nondeportability post-date his 1998 removal hearing. Maryland case law making clear that reckless endangerment does not require the use of force, however, predates Massis's hearing. *See* Pet. 4. Moreover, this Court's decision in *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), interpreting a "crime of violence" to require as an element or by its nature the use of force or a substantial risk thereof, is fully applicable to Massis's case, which was pending at the time of that decision. *See United States* v. *Rivera-Nevarez*, 418 F.3d 1104, 1107 (10th Cir. 2005); *see also Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312-313 (1994) (explaining that "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction"). Certainly, Respondents do not contend that if Massis had preserved his legal challenge to his deportability before the agency, he would not be entitled to relief. Although Respondents suggest (Opp. 19 n.5) that Massis would be

Massis challenged his deportability before the BIA when he timely sought reopening to prevent a miscarriage of justice, thereby fulfilling the purposes of exhaustion by providing the BIA with an opportunity to consider the issue in the first instance. *See* Pet. 6; CAJA 331-333.[10]

Finally, Respondents have suggested that, even if Massis had raised this deportability argument in the BIA on direct appeal, the Board could not have considered it. *See* Opp. 3 (citing *Matter of In Ku Kim*, No. A047-413-659, 2009 WL 2370858 (BIA July 22, 2009)). If true, this makes the case for judicial consideration of Massis's argument even more compelling. Otherwise, an erroneous concession of removability could *never* be examined on appeal—by either the BIA or a court—before a lawful permanent resident is removed.

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independently deportable under 8 U.S.C. § 1227(a)(2)(E), they never made that argument before, and for good reason: that provision is inapplicable to cases, like this one, that arose before its enactment. *See Matter of Gonzalez-Silva*, 24 I. & N. Dec. 218 (BIA 2007). In any event, the only relevant question is whether Massis is deportable *as charged*.

[10] Respondents have no answer to Massis's showing (Pet. 29) that an alien can exhaust an issue by raising it in the BIA in a motion to reopen. And Respondents wrongly suggest (Opp. 20) that Massis did not raise the issue in his motion to reopen. The motion to reopen, cited throughout Massis's merits brief in the Fourth Circuit, argued that his conviction for reckless endangerment did not constitute a deportable "aggravated felony" as charged. *See* Pet. C.A. Br. 11; CAJA 323-327. Notably, the government in response engaged Massis on the merits of his deportability argument, never suggesting that Massis failed to exhaust the issue. Supp. AR 28-44.

III. THE PETITION PROPERLY PRESENTS THE QUESTION WHETHER EFFECTIVE ASSISTANCE OF COUNSEL IN REMOVAL PROCEEDINGS IS PROTECTED BY THE FIFTH AMENDMENT

Respondents contend (Opp. 24) that this Court should not resolve the sharp conflict among the circuits about whether aliens in removal proceedings have a right under the Due Process Clause of the Fifth Amendment to effective assistance from their retained counsel because "[j]urisprudence on the issue is still developing in the courts of appeals." That submission is misguided. While the Fourth and Eighth Circuits have answered the question in the negative, *see Afanwi* v. *Mukasey*, 526 F.3d 788, 799 (4th Cir. 2008), *vacated and remanded*, No. 08-906, 2009 WL 3161844 (U.S. Oct. 5, 2009); *Rafiyev* v. *Mukasey*, 536 F.3d 853, 861 (8th Cir. 2008), other circuits have remained firm in their position to the contrary.[11] No further development in the circuits would aid the Court on this question.

Respondents also argue (Opp. 25) that resolution of the constitutional question would not aid Massis because, it contends, the court of appeals concluded that

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[11] Respondents' reliance (Opp. 24-25) on dicta in a footnote to a recent Ninth Circuit opinion, *Alcala* v. *Holder*, 563 F.3d 1009, 1015 n.11 (9th Cir. 2009), to suggest otherwise is mistaken. The Ninth Circuit has consistently reaffirmed its view post-*Afanwi* that the Due Process Clause encompasses a right to effective assistance of retained counsel during removal proceedings. *See Torres-Chavez* v. *Holder*, 567 F.3d 1096, 1100 (9th Cir. 2009); *Ahmed* v. *Mukasey*, 548 F.3d 768, 771 (9th Cir. 2008). Other circuits also continue to adhere to their pre-*Afanwi* positions. *See, e.g.*, *Fustaguio do Nascimento* v. *Mukasey*, 549 F.3d 12, 17 (1st Cir. 2008); *Kapic* v. *Holder*, 321 F. App'x 49, 51 (2d Cir. 2009); *Richardson* v. *United States*, 558 F.3d 216, 223 n.7 (3d Cir. 2009).

his first counsel was not ineffective. But the Fourth Circuit applied a relaxed abuse-of-discretion standard to review the BIA's rejection of Massis's ineffective-assistance claim; it did not consider whether Massis's counsel provided *constitutionally* ineffective assistance. Pet. App. 11a-13a.

Moreover, although Respondents theorize (Opp. 25) that Massis's first counsel made a tactical decision to concede deportability and instead seek a form of discretionary relief under Section 212(c) of the INA, that speculation finds no basis in the record. To the contrary, Massis's concession took place before *INS* v. *St. Cyr*, 533 U.S. 289 (2001), held that Section 212(c) relief remained available to aliens pleading guilty before that statute's repeal. As a direct result of Massis's erroneous concession of removability, the IJ told Massis that he was statutorily *ineligible* for Section 212(c) relief[12]—a ruling that took Massis years to overturn. It therefore strains credulity to view Massis's concession as some kind of advantageous legal strategy. Furthermore, it was unnecessary for his counsel to choose between contesting deportability and requesting a Section 212(c) waiver, as aliens in removal proceedings routinely pursue both avenues of relief. Pet. 33 n.16.

This case thus presents an appropriate vehicle to resolve the deep circuit split on whether aliens have a constitutional right to effective assistance of counsel in removal proceedings.

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[12] CAJA 14 ("[M]y decision based on the law is that there is no relief available to you. You must be deported.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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